



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 0781 OF 2023

KOROS KIPROTICH..... COMPLAINANT

-VERSUS-

HIGHER EDUCATION LOANS BOARD.....RESPONDENT

DETERMINATION

(Pursuant to Section 8(f), 56 and 57 of the Data Protection Act, 2019, and Regulation 14 of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021)

A. INTRODUCTION

1. The Constitution of Kenya 2010, under Article 31 recognizes the right to privacy. Consequently, in an effort to further guarantee the same, the Data Protection Act, 2019 (hereinafter "the Act") was enacted. Section 8 (1) (f) 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) 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.
2. The Office of the Data Protection Commissioner (hereinafter as "the Office") is a regulatory Office, established pursuant to the Data Protection Act, 2019. The Office 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;

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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.

3. The Office received a complaint dated 11th May 2023 by Koros Kiprotich against the Respondent through e-mail. The Complainant alleges that the Respondent failed and/or neglected to update his loan repayment information.
4. On 5th June 2023, the Office in the exercise of its mandate as envisaged under the Act and in the promotion of justice, notified the Respondent of the complaint filed against it *via* a Notification of Complaint. The Respondent received the Notification letter on 5th June 2023. In the notification of the complaint filed against the Respondent, the Respondent was to provide: -
 - a) A response to the allegation made against it by the complainant and, a contact person who can provide further details as regards this complaint.
 - b) Any relevant materials or evidence in support of the Response in (a) above;
 - c) Details of how the complainant's data is collected, stored, and processed.
 - d) The legal basis relied upon to process and engage with the complainant and whether or how HELB fulfils the duty to rectify incorrect and inaccurate information under Section 40 of the Act;
 - e) Details (in writing) of;
 1. The mitigation measures adopted or being adopted to address matters arising from this complaint;
 2. The technological and organizational safeguards that have been put in place to ensure that such occurrences mentioned in the complaint do not take place again; and
 3. HELB's data protection policy outlining the complaints handling mechanisms to deal with matters relating to the rights of a data subject under the Act, the Regulations, and any alleged contravention directed to your attention by data subjects.

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- f) Demonstration (by way of a written statement) of their level of compliance with the requirements under the Act and the Regulations. In particular, an elaborate representation of how a data subject can exercise their rights in relation to data protection.
5. The Respondent acknowledged the Complaint *vide* a letter dated 8th June 2023. The physical copy was received on 9th June 2023 indicating that the Respondent will comprehensively respond to issues raised on or before 19th June 2023.
 6. On 22nd June 2023, the Office sent a reminder to the Respondent to comprehensively respond to the issues raised in the Notification of Complaint. The reminder was received by the Respondent on 22nd June 2023.
 7. On 29th June 2023, the Office received a response from the Respondent *vide* a letter dated 27th June 2023. The Response addressed all the issues the Respondent was called upon to address in the Notification of Complaint. The Respondent also adduced its Data Privacy Statement, Certificate of Registration as a Data Controller, and Consent for Collection and Processing of Personal Data as evidence of its compliance with the Act.
 8. This determination is premised on the provisions of Regulation 14 of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations 2021 which states that the Data Commissioner shall, upon the conclusion of the investigations, make a determination based on the findings of the investigations.

B. NATURE OF THE COMPLAINT

9. The Complaint relates to the inaccuracy of the data subject's personal data. Furthermore, the Complaint also relates to the infringement of the data subjects' right to the correction of false and misleading data.
10. The Complainant alleges that the Respondent failed and/or neglected to update his loan repayment information. The Complainant stated that he had cleared all his Higher Education Loans Board (HELB) arrears and he has a Credit Reference

Bureau (CRB) clearance certificate yet his status at the Higher Education Loans Board (HELB) portal still read as default.

C. THE RESPONDENT'S RESPONSE TO THE COMPLAINT

11. The response to the Complaint is dated 27th June 2023 and was received by the Office on 29th June 2023. In their response, the Respondent addressed the allegations contained in the Complaint leveled against it. The Respondent considered the Complaint and proceeded to demonstrate the manner in which they had complied with the Act.
12. The Respondent acknowledged that the Complainant was a beneficiary of the HELB loan. The Respondent stated that the Complainant was listed with the CRB as per the Credit Reference Bureau Regulations, 2020 after he defaulted on his outstanding loan for 17 months on diverse dates between July 2013 and February 2016. The Respondent further stated that the Complainant resumed repayment on March 2016 and has since cleared his loan and submitted the loan statements as evidence of this.
13. The Respondent stated that the Complainant's allegation that his HELB status on HELB portal was in default and that it was not updated by 11th May, 2023 were false because the Complainant had cleared his loan as indicated in his loan statement accessible on the HELB portal. The Respondent further stated that although the Complainant has cleared his loan, the status at CRB would still read closed with a default history regardless of a clearance certificate from CRB.
14. As to compliance with the Act, the Respondent stated that: -
 - i. The Complainant's allegation that his HELB status on HELB's portal was in default and not updated as of 11th May 2023 is not true since he had cleared his loan.
 - ii. The evidence supporting the response included a Loan statement for the period ending July 2016, a Statement for the period starting July 2016 to February

2022, a Data Protection Privacy Statement, Consent for the collection and processing of personal data, Data Controller Registration certificate.

- iii. HELB collects data in physical form, and stores the data in a database in a Data center in Kenya, all data is processed internally using an ERP system.
- iv. HELB fulfills the duty to rectify inaccurate information under Section 40 of the act by verifying personal data relating to biodata from the source at Integrated Persons Registry System (IPRS), further personal data can be rectified at HELB student's portal.
- v. Realtime updates of CRB complaints and the use of Alternative Dispute Resolution (ADR) are the mitigation measures adopted by HELB to address matters arising from this complaint.
- vi. To ensure such occurrences do not take place again HELB is engaging CRBs to integrate HELB systems through Application Programming Interface (APIs) for seamless updates, loanees can access their statements through the student's portal.
- vii. HELB currently has a data protection policy that is pending approval by the board, further HELB has a designated Data Protection Officer (DPO).

D. ISSUE FOR DETERMINATION

- i. Whether the Respondent has violated the principles of data protection and the Complainant's rights as a data subject.

E. ANALYSIS AND DETERMINATION

I. WHETHER THE RESPONDENT HAS VIOLATED THE COMPLAINANT'S RIGHTS AS A DATA SUBJECT

15. The crux of the Complaint herein relates to principles of data protection, specifically, to the accuracy of personal data. The Complaint relates to the principle of ensuring personal data processed is accurate by updating the Complainant's

personal data. The Complainant alleges that the Respondent failed and/or neglected to update his loan repayment information contrary to the Act.

16. Section 25 of the Data Protection Act provides for the principles of data protection.

Principles of data protection.

Every data controller or data processor shall ensure that personal data is –

- (a) Processed in accordance with the right to privacy of the data subject.***
- (b) ...***
- (c) ...***
- (d) ...***
- (e) ...***
- (f) Accurate and, where necessary, kept up to date, with every reasonable step being taken to ensure that any inaccurate personal data is erased or rectified without delay; (emphasis)***
- (g) ...***

17. Section 26 (d) and (e) of the Act outlines the rights of a data subject, including the right to rectification and erasure. The Act states that:

A data subject has a right--

- (a) to be informed of the use to which their personal data is to be put;***
- (b) to access their personal data in the custody of the data controller or data processor;***
- (c) to object to the processing of all or part of their personal data;***
- (d) to correction of false or misleading data; and***
- (e) to deletion of false or misleading data about them.***

18. The Act goes to further emphasize on the right of a data subject to rectification and erasure of personal data under Section 40 which states that:

- (1) A data subject may request a data controller or data processor –***

- (a) to rectify without undue delay personal data in its possession or under its control that is inaccurate, outdated, incomplete or misleading; or*
- (b) 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.*
- (2)** *Where the data controller has shared the personal data with a third party for processing purposes, the data controller or data processor shall take all reasonable steps to inform third parties processing such data, that the data subject has requested—*
- (a) the rectification of such personal data in their possession or under their control that is inaccurate, outdated, incomplete, or misleading; or*
- (b) The erasure or destruction of such personal data that the data controller is no longer authorized to retain, irrelevant, excessive, or obtained unlawfully.*
- (3)** *Where a data controller or data processor is required to rectify or erase personal data under sub-section (1), but the personal data is required for the purposes of evidence, the data controller or data processor shall, instead of erasing or rectifying, restrict its processing and inform the data subject within a reasonable time.*

19. From the above provisions of the Act, it is clear that data controllers and data processors have an obligation to ensure the personal data of data subjects is accurate and kept up to date. Further, the data controller and data processor is obligated to promptly erase and rectify any inaccurate personal data.

20. The Respondent herein is a data controller registered with this Office, as such, it has a responsibility to comply with the principles of data protection. As a data controller, it has a responsibility to constantly ensure that the personal data it processes is accurate and up to date.

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21. From the Complaint brought before this office, it is evident that the principles of data protection were not followed, more specifically, the principle of accuracy and updating personal data and where necessary to rectify or erase inaccurate data.
22. The Respondent in its response avers that although the Complainant cleared all his HELB arrears, his status at the HELB portal will still read closed with a default history regardless of the clearance certificate from CRB.
23. Further, in the Respondent's response dated 8th June 2023, the Respondent acknowledges that the Complainant's records should have been updated when he resumed repaying his loan and that they had since updated his status with both Metropol and Transunion CRBs. The Respondent further stated they deeply regretted their inordinate delay in this.
24. The Complainant availed to the Office of a TransUnion CRB certificate. Further, the Complainant adduced evidence which clearly indicated that the HELB loan/credit accounts status still reads as default. It is evident that the Respondent failed to update the Complainant's status. The Complainant's data is under the control of the Respondent; hence the Respondent should have ensured the data is kept up to date and accurate at all material times and rectified without undue delay.
25. It is therefore our finding that the right of the Complainant to correction and rectification of personal data was violated and as such the Respondent is found liable for violation of the Complainant's rights.

F. DETERMINATION

26. In consideration of all the facts of the Complaint and evidence tendered, the Data Commissioner, makes the following final determination;
- a. The Complainant's right to rectification and erasure of personal data has been violated.

- b. The Respondent is hereby directed to rectify and/or update its records to ensure the Complainant's personal data shared with third parties is accurate, within 7 (seven) days from the date hereof.
- c. In the event of failure to adhere to (b) above, an Enforcement Notice is to be issued.
- d. Parties have the right to appeal to the High Court of Kenya.

DATED at **NAIROBI** this 2nd day of August 2023.


Immaculate Kassait, MBS

