



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 830 OF 2023

TOM RUTO..... 1ST COMPLAINANT

EDWIN TARAGON.....2ND COMPLAINANT

-VERSUS-

PREMIER CREDIT LIMITED.....RESPONDENT

FINAL DETERMINATION

(Pursuant to Sections 8(1)(f) and 56 of the Data Protection Act, 2019 and Regulation 14 of the Data Protection (Complaint 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 as "the Act") was enacted.
2. The Office of the Data Protection Commissioner (hereinafter as "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.

3. 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.
4. It is on that basis that the Office received two complaints from Tom Ruto and Edwin Taragon (hereinafter as "the Complainants") dated 20th May, 2023 and 29th May, 2023 respectively, against Premier Credit Limited (hereinafter as "the Respondent") and pursuant to Section 56 of the Act and Regulation 14 of the Data Protection (Complaint Handling Procedure and Enforcement) Regulations, 2021, has conducted investigations into the complaints.
5. The Office in exercise of its mandate as envisaged under the Act and in the promotion of justice, notified the Respondent of the complaints filed against it *via* a letter dated 2nd June, 2023. In the notification of the complaints letter, the Respondent was to provide: -
 - a) A response to the allegations made against it by the Complainants;
 - b) Any relevant material or evidence in support of its representation above;
 - c) The mitigation measures adopted or being adopted to address the complaints to the satisfaction of the Complainants;
 - d) The legal basis relied upon to store, process and engage with the Complainants' personal data and whether or how it fulfils the duty to notify under Section 29 of the Act;
 - e) The technological and organizational safeguards that have been put in place to ensure that such occurrence mentioned in the complaints do not occur again;
 - f) Its data protection policy outlining the complaint handling mechanism to deal with matters relating to the rights of a data subject under the Act, the

Regulations, and any alleged contravention directed to its attention by data subjects;

- g) Proof of how it is complying with Regulation 17 of the Data Protection (General) Regulations, 2021 which provides for mechanisms to comply with opt out requirement; and
 - h) Demonstration (by way of written statement) of its level of compliance with the requirements under the Act and the Regulations. In particular, an elaborate representation of how data subjects can exercise their rights in relation to data protection.
6. On 16th June, 2023, the Respondent, responded to the Notification of Complaints filed against it.
 7. On 10th August, 2023, the Office in exercise of its investigative powers enshrined under Section 60 of the Act, served the Respondent with a court order requiring it to grant the Office access to its digital and manual records to inspect/investigate and obtain information pertaining to the complaints under investigation.
 8. The Respondent's complied with the order and granted the Office access to their digital records. They further sent screenshots of the relevant information stored in their database to the Office in compliance with the order.
 9. Upon receipt of the aforementioned correspondences and documents, investigations were conducted as required by Regulation 13 (1) of the Data Protection (Complaint Handling Procedure and Enforcement) Regulations, 2021.
 10. 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

11. The crux of the complaints against the Respondent, as supported by the evidence adduced to the Office, is that the Respondent sent promotional messages to the Complainants without their consent.

ANALYSIS OF EVIDENCE ADDUCED

I. EVIDENCE ADDUCED BY THE COMPLAINANTS

12. The 1st Complainant filled the complaint form and stated that he received insistent messages from the Respondent asking him to take loans with them yet he never provided his contact to them. He produced screenshots of the said messages as proof.

13. The 2nd Complainant also filled the complaint form and stated that his number is being used for marketing purposes without his consent. He further stated that his number has been publicised and provided screenshots of the messages as proof.

II. EVIDENCE ADDUCED BY THE RESPONDENT

14. The Respondent *via* a letter dated 16th June, 2023, responded to the notification of complaints letter.

15. In the said letter, the Respondent stated that it had completed investigations of the two phone numbers used to contact the Complainants i.e., [REDACTED] and [REDACTED], and confirmed that the numbers are neither the Company's official registered numbers nor do they belong to any of the Company's employees.

16. The Respondent further stated that it had completed internal investigations of the names of the Complainants and confirmed that the names do not exist in the Company's database.

17. The Respondent averred that all its employees and independent sales agents are obligated to comply with their obligations under the Data Protection Act and that it sensitizes them to cease from sending direct marketing/promotional communication via personal numbers.
18. The Respondent stated that all its direct marketing/promotional communication is sent via its official number currently registered as "*PremierInfo*" and that all its promotional messages are sent to data subjects who have explicitly consented to receive promotional messages.
19. In addition, it was the Respondent's position that the promotional messages sent have a visible, clear, and easily understandable explanation of how a data subject may opt-out by dialling the USSD code at the end of every promotional message.
20. The Respondent denied collecting or processing the Complainants' personal data and indicated that it collects personal data of data subjects directly from the data subjects when they voluntarily interact with the Company's official numbers, when they visit the Company's offices, or when they fill and execute loan application documents.
21. Subsequent to the service of the court order and the search conducted by investigators from the Office on the Respondent's database, the Respondent availed screenshots from their database indicating that the mobile phone numbers in question i.e., [REDACTED] and [REDACTED] belonged to their independent sales agents. It also availed a screenshot indicating that the 2nd Complainant was their customer and had an active loan.
22. The Respondent also provided the relevant copies of the independent sales agent agreements it had with its independent agents that operated the aforementioned mobile phone numbers.



C. ISSUES FOR DETERMINATION

23. Having considered the evidence adduced, it is not in dispute that the Respondent through its data processors (independent sales agents), sent promotional messages to the Complainants.

24. The issues for determination are therefore;

- i. Whether prior consent was sought and obtained from the Complainants before collecting their personal data and using it to send promotional messages to them.
- ii. Whether the Respondent provided an opt out mechanism to the Complainants to its promotional messages.
- iii. Whether there was any infringement of the Complainants' Rights as data subjects as provided for in the Data Protection Act, 2019.

I. WHETHER PRIOR CONSENT WAS SOUGHT AND OBTAINED FROM THE COMPLAINANTS BEFORE COLLECTING THEIR PERSONAL DATA AND USING IT TO SEND PROMOTIONAL MESSAGES TO THEM

25. Section 2 of the Act defines **consent** as *any manifestation of express, unequivocal, free, specific and informed indication of the data subject's wishes by a statement or by a clear affirmative action, signifying agreement to the processing of personal data relating to the data subject.*

26. The burden of proof for establishing the data subject's consent to the processing of their personal data for a specified purpose rests with the data controller or data processor as provided for in Section 32(1) of the Act.

27. The 1st Complainant alleged that the Respondent sent him promotional messages yet he never provided his contact to them. The Complainant produced screenshots of the promotional messages as evidence of the same.

- 28.No evidence was tabled by the Respondent to prove that it obtained prior consent from the 1st Complainant before collecting and processing his personal data.
- 29.The 2nd Complainant alleged that his number was being used for marketing purposes without his consent and that his number has been publicised.
- 30.The Respondent initially denied that it did not have any relationship with the 2nd Complainant but a search on its database by our Officers revealed that the 2nd Complainant was in deed its customer and had an active loan as at 10th August, 2023.
- 31.No evidence was tabled by the Respondent to demonstrate that it obtained express consent from the 2nd Complainant to use his personal data for commercial purposes contrary to Section 37 of the Act. Further, no evidence was tabled to show that the Respondent notified the 2nd Complainant that direct marketing was one of the purposes for which his personal data was collected. The 2nd Complainant provided his personal data only for purposes of obtaining a loan from the Respondent and did not consent to the further processing of his personal data.
- 32.From the foregoing, it is clear that the Respondent has not discharged its burden of proof for establishing that it obtained prior consent before using the Complainants' personal data for commercial purposes. The upshot is that I find that the Respondent did not obtain prior Consent from the Complainants and used their personal data for commercial purposes contrary to Section 37 of the Act.

II. WHETHER THE RESPONDENT PROVIDED AN OPT OUT MECHANISM TO THE COMPLAINANTS TO ITS PROMOTIONAL MESSAGES

33. Regulation 15 (1)(d) of the Data Protection (General) Regulations, 2021 provides that *a data controller or data processor may use personal data, concerning a data subject for the purpose of direct marketing where the data controller or the data processor provides a simplified opt out mechanism for the data subject to request not to receive direct marketing communications.* A perusal of the screenshots of the messages sent to the Complainant reveal that no opt out mechanism was provided for the Complainants to request not to receive the promotional messages.
34. Regulation 17 (1) of the Data Protection (General) Regulations, 2021 states that, *"In communicating with a data subject on direct marketing, a data controller or data processor shall include a statement which is prominently displayed, or otherwise draws the attention of the data subject to the fact that the data subject may make an opt out request."* No evidence was tabled by the Respondent to prove that it had complied with the above Regulation.
35. Regulation 17 (2) of the Data Protection (General) Regulations, 2021 states that, *"A data controller or a data processor may, in complying with an opt out requirement –*
- (a) Clearly indicate, in each direct marketing message, that a data subject may opt out of receiving future messages by replying with a single word instruction in the subject line;*
 - (b) Ensure that a link is prominently located in the email, which takes a data subject to the subscription control centre;*
 - (c) Clearly indicate that a data subject may opt out of future direct marketing by replying to a direct marketing text message with a single word instruction;*
 - (d) Inform the recipient of a direct marketing phone call that they can verbally opt out from any future calls; and*
 - (e) Include instructions on how to opt out from future direct marketing, in each message.*

The promotional messages sent to the Complainant did not comply with (a), (c) and (e) above.

36. The upshot is that I find that the Respondent did not provide a simplified opt out mechanism to its promotional messages, contrary to Regulation 15(1)(d) of the Data Protection (General) Regulations, 2021 which oblige data controllers and data processors to provide a simplified opt out mechanism for the data subject to request not to receive direct marketing communications.

III. WHETHER THERE WAS ANY INFRINGEMENT OF THE COMPLAINANTS' RIGHTS AS DATA SUBJECTS AS PROVIDED FOR IN THE DATA PROTECTION ACT, 2019

37. Section 26 of the Data Protection Act provides for the rights of a data subject which are: -

- a) to be informed of the use to which their personal data is to be put;*
- b) to access their personal data in custody of 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.*

38. The Respondent, by not informing the Complainants of the use to which their personal data was to be put at the point of collection of the personal data, violated their right to be informed. The Respondent collected the mobile phone numbers of the Complainants and did not inform them that they were to be used to send promotional messages to them. Further, the Respondent did not provide details or an explanation of where it got the contact details of the 1st Complainant as it is alleged that the Respondent did not collect the same directly from the 1st Complainant.

39. Section 40(1)(b) provides for the right of erasure of personal data that was obtained unlawfully. Further, Regulation 12(1)(d) of the Data Protection (General) Regulations, 2021 states that, "*... a data subject may request a data controller or data processor to erase or destroy personal data held by the data controller or data processor where the processing of personal data is for direct marketing purposes and the individual objects to that processing.*"
40. The Respondent did not provide evidence of erasure/deletion of the 1st Complainant's personal data from its database or records despite requests by the Complainant to do so thereby violating his right of erasure of personal data that was obtained unlawfully, contrary to Section 40(1)(b) of the Act. The Respondent neglected/failed to erase or destroy the personal data of the Complainant despite processing it for marketing purposes and the Complainant having objected to the processing, contrary to Regulation 12(1)(d) of the Data Protection (General) Regulations, 2021.
41. The Respondent collected the contact details of the 1st Complainant from a third party without the consent of the Complainant contrary to Section 28 (1) of the Act which states that, "a data controller or data processor shall collect personal data directly from the data subject."
42. The Respondent also neglected/failed to perform its duty to notify by not informing the Complainants of the particulars contained in Section 29 of the Act.
43. The Respondent further used the personal data of the Complainants for commercial purposes without their consent contrary to Section 37(1)(a) of the Act.
44. It is not lost to the Office that the Respondent intentionally and deliberately, in its response letter dated 16th June, 2023, gave the Office information which was false and misleading. The Respondent categorically denied that the subject mobile phone numbers, that sent the promotional messages to the

Complainants, belonged to it or its agents. It was only after investigation officers from the Office visited its premises and conducted a search on its database that the said numbers were found to belong to the Respondent's independent sales agents.

45. Additionally, the Respondent falsely indicated that the 2nd Complainant's name was not in its database when in fact, the search conducted on the Respondent's database divulged that the 2nd Complainant was its client. The above actions by the Respondent amount to obstruction of the Data Commissioner contrary to Section 61 of the Act and imposes criminal liability on the offender.

46. In view of the foregoing, I arrive at the conclusion that the Respondent violated the rights of the data subject as provided for in the Act.

D. FINAL DETERMINATION

- I. The Data Commissioner therefore makes the following final determination;
- i. The Respondent is hereby found liable.
 - ii. An Enforcement Notice to hereby be issued to the Respondent.
 - iii. Parties have the right to appeal this determination to the High Court of Kenya.

DATED at **NAIROBI** this 17th day of August 2023



IMMACULATE KASSAIT, MBS
DATA COMMISSIONER