



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 1626 OF 2023 AS CONSOLIDATED WITH ODPC COMPLAINT NO. 1797 OF 2023 AND ODPC COMPLAINT NO. 1835 OF 2023

PETER MBUGUA.....1ST COMPLAINANT

TIMOTHY NGOME.....2ND COMPLAINANT

AGGREY TIMOTHY.....3RD COMPLAINANT

-VERSUS-

CREDIT WATCH INVESTMENT LIMITED.....RESPONDENT

DETERMINATION

(Pursuant to Section 8(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 Office received complaints from Peter Mbugua, Timothy Ngome and Aggrey Timothy (hereinafter the '1st Complainant', '2nd Complainant' & '3rd Complainant' respectively and/or collectively 'the complainants') on diverse dates in September 2023 against CreditWatch Investments Limited (hereinafter 'the Respondent') regarding listing of the complainants as guarantors without their consent.

B. LEGAL BASIS

2. The Constitution of Kenya 2010, under Article 31 (c) and (d) 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 '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 (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 (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 COMPLAINTS

6. This Office received a complaint from the 1st Complainant on 6th September 2023. The 2nd and 3rd Complainants lodged their complaints on 27th September 2023 and 29th September 2023 respectively. The complaints were lodged pursuant to Section 56 of the Act and Regulation 4 of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021 (hereinafter the 'Enforcement Regulations') from the Complainants who are the aggrieved data subject.
7. The complaints lodged raised similar issues against the Respondent. As per Regulation 9 (1) (a) of the Enforcement Regulations, the Data Commissioner may, with the consent of the complainants, consolidate the complaints and

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make a determination. The Complainants were requested for consent to consolidate the complaints and they agreed to the said request.

8. The Respondent is a digital credit provider with a money lending product known as Cloudloan.
9. Pursuant to Regulation 11 of the Enforcement Regulations, the Office, notified the Respondent of the complaints filed against it *vide* a letters dated 18th September, 2023 referenced ODPC/CONF/1/5 VOL 1 (352) and 1st November 2023 referenced ODPC/CONF/1/5 VOL 1 (518). In the notifications of the complaint filed against the Respondent, the Respondent was to provide: -
 - a. A response to the allegation made against them by the Complainant;
 - b. Any relevant materials or evidence in support of the response;
 - c. The Standard Contract between themselves and the Complainants;
 - d. The legal basis relied upon to process and engage with the Complainant, and whether they fulfilled the duty to notify under Section 29 of the Act;
 - e. Details of their mitigation measures and technological and organizational safeguards in place to ensure such occurrences do not take place again;
 - f. Their data protection policy;
 - g. Demonstration (by way of written statement) of your level of compliance with the requirements under the Act and the Enforcement Regulations. In particular, an elaborate representation of how data subject can exercise their rights in relation to data protection.
10. The Respondent responded to the notifications of complaint *vide* letters dated 13th October, 2023 and 17th November 2023.
11. This determination is therefore as a result of analysis of the complaint as received and the responses from the Respondent.

D. NATURE OF THE COMPLAINT

12. The 1st Complainant alleged that Cloudloan sent him several text messages stating that he asks someone who was given a loan by the Respondent to pay back. He stated that the Respondent never contacted him while issuing the loan and therefore requested this Office's intervention on the same.

13. The 2nd Complainant alleged that he was persistently receiving text messages and calls from different numbers asking him to contact someone else and remind him to pay his loan. He stated that he was deemed to be a loan defaulter yet he was not.
14. The 3rd Complainant stated that he was listed as a guarantor for a loan acquired from Cloudloan unlawfully and without his consent.

E. SUMMARY OF EVIDENCE ADDUCED

i. THE COMPLAINANTS' CASE

15. The Complainants provided screenshots of messages on diverse dates from different numbers asking them to advise the loanees to pay their overdue loans advanced by Cloudloan. The messages indicated that the Complainants were listed as emergency contacts by the loanees while securing a loan from Cloudloan.

ii. THE RESPONDENT'S RESPONSE

16. In their responses, the Respondent acknowledged the distress that unsolicited communication causes, however, they stated that they take matters of privacy and data protection seriously and they comply with all relevant data protection regulations and they strive to maintain the highest standards in privacy and communication practices.
17. With regards to the complaints, the Respondent stated that their customers are informed of the inclusion of their contacts as emergency or secondary contact during the application process for Cloudloan and that it is the clients' responsibility to ensure that the emergency contacts provided are aware of their inclusion and consent to being emergency contacts. They stated that failure to consent to the inclusion, the registration process does not proceed.

18. The Respondent indicated that they encourage their clients to communicate with their emergency contacts and inform them of their inclusion in their Cloudloan application.
19. With regards to the standard contract between themselves and the complainants, the Respondent stated that Cloudloan's contractual relationship primarily exists with the client who applied for their services as per the loan agreement and the terms of service accepted by the client during the application process.
20. The Respondent indicated that the emergency contacts (the Complainants) are included in the application as a point of contact in case of emergencies and a point of reference for communication and to be contacted in case the client is not reachable.
21. On the question of legal basis relied upon to engage with the Complainants, the Respondent indicated that the legal basis for processing and engaging with emergency contacts is based on legitimate interests as outlined in their privacy policy. They also stated that they obtain explicit consent from their clients during the registration process to engage with the emergency contacts.
22. The Respondent indicated that with regards to the duty to notify under Section 29 of the Act, their privacy policy states the circumstances under which they engage with emergency contacts. Further, upon registration, their clients are duly informed of their intention to contact the emergency contacts in case of a critical situation or as outlined in their terms and conditions.
23. The Respondent stated that the mitigation measures that they have put in place to address the complaints include a process by which the client can request to change or edit their emergency contact information. This is done through a request form or a link to an online portal where they can update their emergency contact details.
24. As for the technological and organizational measures put in place to ensure that such occurrences do not take place again, the Respondent indicated that they

have an enhanced data verification process to ensure that emergency contact information provided by the data subject, who is their client, is captured and verified during the registration process. They also indicated that they have improved data privacy controls and data subject consent verification process and they conduct regular internal compliance audits.

25. The Respondent provided its Data protection Policy and an outline of their level of compliance with the requirements under the Act and the Regulations. These documents are acknowledged and can be subjected to inspection and compliance audits by this Office.

F. ISSUES FOR DETERMINATION

26. The following issues fall for determination by this Office:

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

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

27. The Complainants are data subjects with rights under Section 26 the Act. Specifically, Section 26 (a) states that a data subject has a right to be **informed** of the use to which their personal data is to be put.

28. Personal data is defined under Section 2 of the Act as **any information** relating to an identified or an identifiable natural person.

29. The Complainants had the right to be informed of the use to which their personal data, particularly their phone numbers, were to be put.

30. From their response, the Respondent collected the Complainants' personal data from third parties - their clients, without informing the Complainants that they were collecting their personal data.

31. This Office therefore finds that the Complainants' rights under Section 26 (a) of the Act were violated by the Respondent.

II. WHETHER THE RESPONDENT FULFILLED ITS OBLIGATIONS UNDER THE ACT

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

33. The Respondent has an obligation under Section 25 of the Act to adhere to the principles of data protection while processing the Complainant's personal data. Particularly, the Respondent is obligated under Section 25 (a) of the Act to ensure that personal data is processed in accordance with the right to privacy of the data subject.

34. Afore-analysis has shown that the Respondent did not uphold the Complainants' rights under Section 26 (a) of the Act and therefore, did not process the Complainants' data in accordance to their right to privacy.

35. Moreover, Sections 25 (b) and (c) of the Act obligate the Respondent to ensure that personal data is processed lawfully, fairly and in a transparent manner in relation to any data subject and collected for explicit, specified and legitimate purposes and not further processed in a manner incompatible with those purposes.

36. The Respondent failed to adhere to these obligations by collecting the Complainants' phone numbers from third parties and processing these numbers for purposes that are incompatible with those provided for under the Act.

37. Further, Section 28 (1) of the Act provides that a data controller or processor shall collect personal data **directly** from the data subject.

38. It is clear from the Respondent's response that they collected personal data of the Complainants from third parties, their clients and not directly from the Complainants.

39. With regards to the duty to notify, the Respondent had an obligation under Section 29 of the Act to, before collecting their personal data, notify the Complainants of, among others:
- a) their rights under Section 26 of the Act;
 - b) the fact that their personal data was being collected;
 - c) the purposes for which their personal data was being collected;
 - d) the contacts of the Respondent and whether any other entity may receive the collected personal data; and
 - e) a description of the technical and organizational security measures taken to ensure the integrity and confidentiality of the data.
40. From their response, the Respondent did not notify the Complainants of any of the above. Collecting phone numbers as emergency contacts of their clients does not preclude the Respondent from fulfilling their obligation under Section 29 of the Act to inform the emergency contacts that they have collected their phone numbers and the purpose of the collection.
41. Section 30 of the Act gives instances where a data controller or processor can lawfully process personal data. It 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 process is necessary for the reasons given in subsection (b).
42. The Respondent failed to prove that the processing of the Complainants' personal data was necessary for any of the reasons given in Section 30 (1) (b) of the Act.
43. Section 32 of the Act provides for the conditions of consent and provides that a data controller and processor shall bear the burden of proof to establish that the data subject consented to the processing of their personal data for a specified purpose.
44. The Respondent failed to discharge this burden by stating that it is their clients who listed the Complainants as emergency contacts. As a data controller, the

Respondent was mandated to ensure that the emergency contacts consent to the processing of their phone numbers as such. The duty is not upon their clients to establish consent but upon them as data controllers and processors.

45. Section 41 of the Act as read together with Part V of the Data Protection (General) Regulations, 2021 provides for data protection by design or by default and mandates the data controller to implement appropriate technical and organisational measures designed to implement the data protection principles in an effective manner and to integrate necessary safeguards for that purpose into the processing. This duty applies both at the time of determining the means of processing the data and at the time of processing the data.

46. The Respondent, stating that they collected and processed the Complainant's phone numbers by virtue of them being listed as emergency contacts without their consent was contrary to the provisions of Section 41 of the Act.

47. Therefore, the Respondent did not fulfil its obligations under the Act with regards to this complaint.

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

48. 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.

49. Having found that the Complainant's rights were violated and that there was non-compliance with the Act, an Enforcement Notice shall be issued against the Respondent pursuant to Section 58 of the Act.

50. Further, Section 65 (1) of the Act provides for compensation to a data subject and states 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. Section 65 (4) of the Act states that "damage" includes financial loss and damage not involving financial loss, including distress.

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

52. The Complainants were distressed by the text messages and calls made to them in a bid to coerce them to contact the loanees of the Respondent to pay their loans. The Respondent admitted that the Complainants did not consent for their phone numbers to be listed as emergency contacts. Therefore, they did not consent to be bombarded with calls and messages regarding the Respondents loanees.

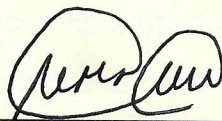
53. In light of the above, the Complainants are entitled to Kshs. 300,000 each from the Respondent.

G. FINAL DETERMINATION

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

- i. The Respondent is hereby found liable for violating the Complainant's right to privacy and failing to fulfil its obligations under the Act;
- ii. An Enforcement Notice be issued against the Respondent;
- iii. An order for compensation to the Complainants of Kshs. 300,000 each by the Respondent; and
- iv. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at **NAIROBI** this 1st day of December 2023.



IMMACULATE KASSAIT, MBS
DATA COMMISSIONER