



OFFICE OF THE DATA PROTECTION COMMISSIONER

THE ALTERNATIVE DISPUTE RESOLUTION (ADR)

FRAMEWORK/GUIDELINES



OUR MANDATE

- i Regulate the processing of personal data;
- ii Ensure that the processing of personal data of a data subject is guided by the principles set out in Section 25 of the Act;
- iii Protect the privacy of individuals;
- iv Establish the legal and institutional mechanism to protect personal data; and
- v Provide data subjects with rights and remedies to protect their personal data from processing that is not in accordance with the Act.

VISION

“To enhance trust and build transparency of data protection in Kenya”

MISSION

“Protect personal data in Kenya through compliance, enforcement, public awareness and institutional capacity development”

CORE VALUES

The ODPC has adopted the following core values:

- i Collaboration and Teamwork
- ii Ethical organisational practices
- iii Transparency and accountability
- iv Inclusive and accessible
- v Organisational effectiveness

FOREWORD

The Data Protection Act, No. 24 of 2019 (DPA) is considered one of the most progressive data privacy laws in Africa. It has robust provisions on the proper handling of personal data to ensure that the rights of data subjects are protected. It elaborates the roles and responsibilities for all data controllers and processors established in Kenya or are processing data touching on data subjects in Kenya.

The Act outlines the mandate of the Office of the Data Protection Commissioner (ODPC) and grants powers to the Data Commissioner to facilitate conciliation, mediation and negotiation of disputes arising from the Act. The Office has developed this ADR Framework as a guide to the general public on settling of disputes submitted to the ODPC through conciliation, mediation and negotiation.

With this ADR Framework in place, the Office anticipates to resolve Data Protection disputes quickly through this mechanism. This will assist in reducing the number of complaints lodged at the Office which would have otherwise taken longer to resolve.

This ADR framework was made possible through the generous support of the United Nations Development Programme (UNDP). We wish to appreciate the consultants who tirelessly assisted in the framework preparation, and also all the external stakeholders who found time to validate the document in a public participation exercise.



Immaculate Kassait, MBS
Data Commissioner

DISCLAIMER

These ADR Guidelines have been prepared for the general guidance of the Stakeholders who wish to engage in Alternative Dispute Resolution (ADR) to resolve their data protection disputes arising under the Data Protection Act, 2019.

These Guidelines should be construed as having the force of guidelines issued under Section 74(1) of the Data Protection Act. However, the Guidelines does not constitute professional advice and Stakeholders are advised not to act upon information contained in the publication without obtaining professional advice from relevant professionals.

No representation or warranty (express or implied) is given as to the accuracy or completeness of the information contained in these Guidelines, and, to the extent permitted by Law, the Data Commissioner does not accept or assume any liability, responsibility or duty of care for any consequences suffered by anyone acting, or refraining to act, in reliance to the information contained in this publication or any decision based on it.

TABLE OF CONTENTS

Preamble.....	1
The Objectives of these Guidelines.....	2
The Legal Basis of the Guidelines.....	2
Initiating Facilitated ADR.....	3
How To Commence ADR.....	3
Decision on Eligibility for Facilitated ADR.....	4
Suitability of Disputes to ADR.....	5
ADR Stakeholders.....	5
Legal/Professional Advisors in ADR.....	6
The ADR Facilitator(s).....	7
The Independence of Facilitator(s).....	7
Rules to Guide ADR Facilitator(s).....	8
Conduct of Parties to ADR.....	9
Management and Procedures in ADR Sitings.....	9
Adjournments.....	10
Working Meetings.....	11
Expert Evidence.....	11
Withdrawal.....	11
Termination of ADR Process.....	12
ADR Agreement.....	13
Signing of the ADR Agreement.....	14
Agreement terms, Settlement Procedures and Approvals.....	15
No Agreement or Determination.....	15
Reservation of Rights.....	16
Review of the Guidelines.....	16
Application and Interpretation.....	16
Annex 1.....	17

ACRONYMS AND ABBREVIATIONS

- i **ADR** - Alternative Dispute Resolution
- ii **ODPC** - Office of Data Protection Commissioner
- iii **DPA** - Data Protection Act, 2019

DEFINITIONS

- 1 Alternative Dispute Resolution (ADR)** – in the context of these Guidelines means voluntary process of settling data protection disputes arising under the Data Protection Act, 2019 between individual complainants and respondent organizations through conciliation, mediation and negotiation facilitated by the Data Commissioner or otherwise through agreement of the parties and with help of a facilitator whether conciliator, mediator or Negotiator.
- 2 ADR Agreement** – Means an executed agreement entered into between parties and witnessed by the Data Commissioner, upon the conclusion of the Alternative Dispute Resolution process whether negotiation, mediation and conciliation and upon the parties reaching a settlement on the dispute with finality.
- 3 Conciliation** – refers to a process through which two or more parties may explore and reach a negotiated solution to their conflict with the help of a neutral third party, the conciliator.
- 4 Dispute** – Means data protection complaint or dispute where applicable between individual complainant(s) and respondent organization(s).
- 5 Facilitator** – Means a person who helps parties to negotiate, mediate or conciliate their Data Dispute by engaging the parties to the data protection dispute and providing indirect or unobtrusive assistance, guidance, or supervision for them to reach an agreement.

- 6 Facilitated ADR** – Means a dispute resolution process facilitated by the Office of the Data Protection Commissioner in resolving Data Protection Dispute(s) arising from Data Protection Act, 2019.
- 7 Mediation** – refers to a process in which a neutral third party actively assists disputing parties in reaching a settlement. The mediator facilitates dialogue in a structured process that helps parties reach a conclusive and mutually satisfactory agreement. It is a voluntary non-binding process.
- 8 Negotiation** – refers to a dialogue between two or more parties intended to seek a common ground, reach an understanding, resolve points of difference and arrive at an agreement to settle a matter of mutual concern or resolve a conflict. It is a strategic discussion that resolves an issue in a way that both parties find acceptable.
- 9 Parties** - Means Complainant and Respondent seeking to engage in ADR.
- 10 Working Meetings** - Refers to the periodic meetings held between a Complainant and the Respondent outside of the Alternative Dispute Resolution meeting during the course of the ADR process.

- 1.1 The Data Protection Act, 2019 provides that the Data Commissioner shall have power to facilitate Conciliation, Mediation and Negotiation arising from the Act. A Data Protection Dispute commences with response from the Respondent in a Data Complaint objection.
- 1.2 These Guidelines seeks to improve on the provisions of the Data Protection (Complaint Handling Procedure and Enforcement) Regulations, 2021 on conciliation, mediation and negotiation as an alternative means of resolving data protection disputes arising under the Act out the Judicial Process.
- 1.3 ADR is a voluntary, participatory and facilitated resolution of data protection dispute between a complainant and respondent through conciliation, mediation and negotiation and facilitated by the Data Commissioner or otherwise through agreement of the parties and with the help of a facilitator whether conciliator or mediator.
- 1.4 Overall, ADR seeks to enrich the entire dispute resolution process by providing flexibility and eliminating the limitations imposed by judicial and quasi-judicial processes and the complexity of technical procedures and high costs of litigation.
- 1.5 ADR is favoured over litigation and administrative action because it gives parties autonomy to achieve settlement on their terms. These Guidelines have been benchmarked against the experiences of many Data Protection Alternative Dispute Resolutions (ADR) from around the World.

2

THE OBJECTIVES OF THESE GUIDELINES

- 2.1 To facilitate Alternative Dispute Resolution (ADR) of Data Protection Disputes through conciliation, mediation and negotiation.
- 2.2 To give Parties an opportunity for amicable resolution of their Data Protection Disputes as an alternate to administrative action and litigation.
- 2.3 To provide the structures, processes and safeguards to support Alternative Dispute Resolution (ADR) of Data Disputes in Kenya.
- 2.4 To outline the basic rules of conduct of Parties and Facilitators and related issues for effective Facilitated ADR of Data Protection Disputes.

3

THE LEGAL BASIS OF FACILITATED ADR

- 3.1 The Alternative Dispute Resolution (ADR) of Data Protection Disputes in Kenya has the following legal basis: -
 - a. Article 159(2)(c) of the Constitution of Kenya, 2010.
 - b. Section 9(1)(c) and Section 74(1) of the Data Protection Act, 2019.
 - c. Section 59C of the Civil Procedure Act, Cap. 21 Laws of Kenya.
 - d. Data Protection (Complaint Handling Procedure and Enforcement) Regulations, 2021.
 - e. Any other laws relevant to Data Protection in Kenya.

4

INITIATING FACILITATED ADR

- 4.1 The parties engaging in facilitated Alternative Dispute Resolution of Data Disputes shall do so on a voluntary basis.
- 4.2 The Complainant or Respondent may request the Data Commissioner to facilitate the resolution of their dispute(s) through ADR using the prescribed ADR application form annexed under these guidelines.
- 4.3 A dispute pending before the Data Commissioner may be referred under these Guidelines to Alternative Dispute Resolution at the request of either party to the dispute, at any stage before issuance of Enforcement Notice, pursuant to the relevant legislation.
- 4.4 A dispute pending before the Data Commissioner may, at any stage before issuance of the Enforcement Notice, be referred under these Guidelines to Alternative Dispute Resolution including Negotiation, Conciliation and Mediation or any other method outside these Guidelines upon written agreement of the Parties.

5

HOW TO COMMENCE ADR

- 5.1 Alternative Dispute Resolution under these Guidelines shall commence upon written communication by the Data Commissioner appointing Facilitator and shall be concluded within ninety (90) days thereof or as extended by the agreement of the Parties.

- 6.1 Upon request by the Parties to the Data Commissioner that a dispute be referred to Alternative Dispute Resolution, the Office of the Data Protection Commissioner shall decide whether the matter is eligible for Facilitated ADR under these Guidelines and shall communicate the decision to the Parties if the decision and reasons is that the Dispute is not eligible for ADR.
- 6.2 Notwithstanding the Decision of the Office of the Data Protection Commissioner that a dispute is not eligible for Alternative Dispute resolution, the parties may agree to pursue Alternative Dispute Resolution outside these Guidelines. However, parties cannot agree to pursue ADR outside these Guidelines if doing so constitutes or leads to a criminal offence or contravenes the Data Protection Act or any other written law.
- 6.3 Where the Parties opt to engage Alternative Dispute Resolution outside these Guidelines, the Data Commissioner may upon a written request signed by the Parties suspend any administrative steps on the Dispute for ninety (90) days or until requested by either party to resume if the ADR process fails.
- 6.4 The Fees for ADR Facilitators and Administrative Costs shall be catered for by either the Complainant, the Respondent or the Office of the Data Protection Commissioner.

7

SUITABILITY OF DISPUTES TO ADR

- 7.1 A dispute may be deemed not be eligible for Alternative Dispute Resolution by the Data Commissioner under these Guidelines where: -
- a. settlement would be contrary to the Constitution of Kenya, the Data Protection Act or any other law;
 - b. the matter in dispute regards technical interpretation of the law;
 - c. it is in the public interest to have judicial clarification of the issue;
 - d. pursuit of the matter through administrative action or the court system would promote compliance;
 - e. one party is unwilling to engage in the Alternative Dispute Resolution process;
 - f. the Data Commissioner has already issued an Enforcement Notice.

8

ADR STAKEHOLDERS

- 8.1 Stakeholders to these Guidelines include but are not limited to: -
- a. Complainant of Data Protection Complaint.
 - b. Respondent to Data Protection Complaint.
 - c. The Office of the Data Protection Commissioner.
 - d. Legal and Professional Advisors.

- e. The Courts.
- f. Professional Bodies, Regulatory bodies and Industries Umbrella Bodies.
- g. Data Controllers, Data Processors and Data Subjects in Private Sector.
- h. Government Agencies that are Data Controllers, Data Processors and Data Agents

9

LEGAL/PROFESSIONAL ADVISORS IN ADR

- 9.1 Any party may engage a Legal Advisor or any other Professional Agent for the following role but not limited to: -
- a. Assisting parties in the implementation of these ADR Guidelines;
 - b. Assisting Parties in the initiation of the ADR process and documentation (where necessary);
 - c. Submitting their Client's Case for ADR Consideration;
 - d. Assisting parties to identify contentious and non-contentious issues in the Data Protection Dispute;
 - e. Assisting parties in the ADR and especially in dispensing with issues for expedited resolution(s).

10

THE ADR FACILITATOR(S)

- 10.1 Upon request by the Parties to the Data Commissioner that a dispute be referred to Alternative Dispute Resolution, the Commissioner shall appoint a facilitator if the matter is deemed eligible for Facilitated ADR;
- 10.2 The Data Commissioner shall satisfy itself of the knowledge, qualifications, skills and expertise of the Facilitator prior to an appointment.
- 10.3 The Facilitator may where feasible initiate and encourage negotiations towards amicable settlement of the Complaint;
- 10.4 If the Facilitator considers it reasonably possible that a complaint may be conciliated successfully, she may conciliate the complaint between the parties.
- 10.5 If in the opinion of the Facilitator the complaint may more appropriately be resolved by mediation, the Facilitator may undertake to mediate the matter or advise the parties to appoint a Mediator.

11

INDEPENDENCE OF THE FACILITATOR(S)

- 11.1 The Facilitator(s) shall disclose any conflict of interest existing before the commencement of the alternative dispute resolution proceedings or which may arise during the proceedings.

- 12.1 The facilitator(s) shall, for the purposes of resolving any dispute:
- a. hold such number of meetings he or she considers appropriate;
 - b. guide the parties in the Alternative Dispute Resolution proceedings towards an amicable settlement;
 - c. remain neutral during and the Alternative Dispute Resolution proceedings;
 - d. assess whether the parties exhausted internal dispute resolution mechanisms;
 - e. consider the harms caused to the complainant and the data involved in the dispute;
 - f. assist in a fair and equitable resolution of the data protection dispute between the parties;
 - g. promote and protect the integrity, confidentiality, fairness and efficiency of the process;
 - h. act independently and avoid any circumstances that may result in a conflict of interest;
 - i. employ procedures that lead to expeditious resolution of the dispute.

13

CONDUCT OF THE PARTIES TO ADR

- 13.1 During the Alternative Dispute Resolution meetings, the parties or their appointed representative(s) shall: -
- a. agree to a set of terms and conditions governing the Alternative Dispute Resolution proceedings;
 - b. assist to identify the contentious and non-contentious issues in dispute;
 - c. uphold and maintain decorum and confidentiality;
 - d. uphold the integrity and fairness of the process;
 - e. participate in all proceedings fairly and diligently;
 - f. make full disclosure of material facts and documentation relevant to the dispute;
 - g. be committed to the Alternative Dispute Resolution process and attend all scheduled meetings;
 - h. strictly adhere to the agreed timelines, except under reasonable circumstances, which shall be communicated to the facilitator and the other party.

14

MANAGEMENT AND PROCEDURES IN ADR SITTINGS

- 14.1 The parties to a dispute shall set the date for an Alternative Dispute Resolution meeting as soon as possible and in any case not later than fourteen (14) days from the date of application requesting for Alternative Dispute Resolution.
- 14.2 At the Alternative Dispute Resolution meeting, the party who made the application shall commence the proceedings

by stating the grounds of the dispute and may support it with relevant evidence.

- 14.3 The other party shall be entitled to reply to the issues raised or evidence adduced by the applicant and is entitled to produce evidence in rebuttal.
- 14.4 The parties, with the guidance of the facilitator(s) may determine the dispute on the basis of all the evidence submitted by the parties during the Alternative Dispute Resolution including all documents filed or oral evidence given.
- 14.5 Any communication with the Facilitator(s) outside the ADR meeting with regard to matters or issues which are the subject of the dispute shall be in writing and copied to all the parties involved in the dispute resolution.

15

ADJOURNMENTS

- 15.1 Where on the date of the meeting either of the parties or their authorized representative does not appear without a justifiable cause, the Facilitator may forthwith schedule another date for the meeting or close the Alternative Dispute Resolution proceedings if he or she deems it appropriate to do so.

16

WORKING MEETINGS

- 16.1 Where necessary, the Facilitator (s) may advise the parties to engage in working meetings for purposes of narrowing down the issues or resolving the dispute.
- 16.2 The Facilitator(s) may attend the working meetings at any time when called upon by the parties to the dispute.

17

EXPERT EVIDENCE

- 17.1 Where in the course of resolving a dispute, a matter arises that in the opinion of the Facilitator or parties requires certain expertise or competence, the Facilitator or the parties by consent, may call upon a subject matter expert to sit at the Alternative Dispute Resolution meeting for the purpose of providing the required expertise.

18

WITHDRAWAL

- 18.1 A party to dispute which is subject to Alternative Dispute Resolution may withdraw from the proceedings at any stage and shall notify the Data Commissioner and other parties of such withdrawal within seven days from the date of making such a decision.

- 19.1 Alternative Dispute Resolution proceedings may be terminated for the following reasons-
- a. where either party opts to terminate the proceedings or both parties mutually agree to terminate the proceedings;
 - b. if a party fails to honour three consecutive Alternative Dispute Resolution meeting invitations without any justifiable cause;
 - c. where a party fails to carry out a reasonable request made by the facilitator(s) without a valid justification;
 - d. where a party or the parties fail to pay the agreed fees of the Facilitator within the stipulated timeline;
 - e. where the ninety (90) day timeline required to resolve disputes under Alternative Dispute Resolution has lapsed and the party that made the Alternative Dispute Resolution application has not sought an extension of time from either the Data Commissioner or the Court, as the case may be.
- 19.2 Upon termination of Alternative Dispute Resolution proceedings, a notice of termination shall be sent to the parties and the matter referred back to the Data Commissioner or the Court, as may be.
- 19.3 Any dispute may be re-admitted to Alternative Dispute Resolution upon application of either party, with the consent of the other party.

- 20.1 Where parties have reached an agreement, the issues agreed upon shall be set out in writing.
- 20.2 The Alternative Dispute Resolution agreement shall set out:
- a. the background of the dispute and the issues in contention;
 - b. the processes and specific exercises undertaken during the Alternative Dispute Resolution proceedings;
 - c. both agreed and non - agreed issues;
 - d. the terms of settlement;
 - e. the compensation payable, where applicable, and justifications thereto;
 - f. undertakings given by each party, if any;
 - g. agreed payment plan, where applicable;
 - h. Award of costs, if any.
 - i. 20.3 The parties, on guidance by the Facilitator may agree on the framing of the ADR Agreement based on the above specifications.

- 21.1 At the conclusion of the Facilitated ADR process, the parties shall sign a negotiation, mediation or conciliation agreement in the Prescribed Form (Form DPC 5) provided under Data Protection (Complaint Handling Procedure and Enforcement) Regulations, 2021.
- 21.2 The written agreement entered into under these Guidelines shall be deemed to be a determination of the Data Commissioner, and shall be enforceable as such.
- 21.3 The written agreement shall: -
- a. shall be dated and signed by the parties or their duly authorized representatives and witnessed by the Data Commissioner;
 - b. a copy shall be retained by each of the parties and the Data Commissioner as evidence of the outcome of the Alternative Dispute Resolution proceedings;
 - c. shall be binding to both parties to the dispute and shall be deemed to be a full and final settlement of the dispute;
 - d. shall be confidential and entered into on a without prejudice basis;
 - e. shall not set a precedent.

- 22.1 Where a dispute is resolved wholly or partially the executed Alternative Dispute Resolution agreement shall be filed with the Data Commissioner by the Facilitator.
- 22.2 Parties to Alternative Dispute Resolution proceedings are obligated to adhere to the terms set out in the executed Alternative Dispute Resolution agreement within the stipulated timelines.
- 22.3 Where either party to the proceedings violates the terms of the Alternative Dispute Resolution agreement, the provisions of section 64 of the Data Protection Act shall be applicable.

- 23.1 Where there is no agreement between the parties after an Alternative Dispute Resolution process, the matter shall be referred back to the Data Commissioner by the facilitator.
- 23.2 Where the complaint is not determined through the Alternative Dispute Resolution process the Data Commissioner shall proceed to determine the complaint as provided for in the Act and the Regulations thereunder.

24

RESERVATION OF RIGHTS

24.1 Parties to the Alternative Dispute Resolution proceedings shall not be denied any other rights they would ordinarily have had they not resorted to Alternative Dispute Resolution.

25

REVIEW OF THE GUIDELINES

25.1 These Guidelines may be reviewed from time to time by the Data Commissioner.

26

APPLICATION AND INTERPRETATION

26.1 The Interpretation of these Guidelines shall be within the Constitution of Kenya, the Data Protection Act, 2019 and the Regulations made thereunder and all laws relevant to Data Protection in Kenya.

26.1 Disputes under Alternative Dispute Resolution prior to these Guidelines shall proceed to their conclusion under the administrative Guidelines for the time being in force.

26.1 Any rights and duties arising from disputes resolved or being resolved prior to the coming into force of these Guidelines shall be binding on the parties to the disputes.

APPLICATION FOR ALTERNATIVE DISPUTE RESOLUTION

Purpose:

To apply for Alternative Dispute Resolution proceedings in accordance with the procedures contemplated in the;

1. Constitution of Kenya, 2010; Article 159 (2) (c).
2. Section 9(1)(c) of the Data Protection Act, 2019.
3. Data Protection (Complaint Handling Procedure and Enforcement) Regulations, 2021.
4. Office of the Data Protection Commissioner ADR Framework.

Notes:

1. Where the space provided is insufficient, please make use of an extension page and attach it to this application form.
2. Pages attached are to be sequentially numbered and the total number thereof are to be stated in the field provided.
3. Please note that you may select more than one box.
4. The completed form and attachments are to be delivered to the Data Protection Dispute Resolution Registry at **Office of Data Protection Commissioner** Headquarters or scanned and e-mailed to **ADR@ODPC.GO.KE**.

A: Details of Complainant (For purposes of further correspondence)

Full Name (s)	Telephone No.	Name of Agent (if not the applicant)	Telephone No.	E-mail Address

B: Address for delivery of documents

Registered business name or name of Respondent/ Agent		
Postal address	Code	
E-mail Address		
Business Telephone Number		

C: Status of dispute: (Indicate with an 'X' in the applicable block (s))

Is the dispute;	i. Lodged with ODPC		Complaint number	
ii. In Court (High Court or Court of Appeal)			Court Reference number	
If 'Other' please specify				

E: Nature of dispute: (Kindly give a brief description of the Dispute if not already lodged with ODPC)

--

F: Grounds for ADR application:

1.
2.
3.
4.
5.
6.

G: Please attach appeal documents

(Memorandum of Appeal, Statement of Facts, Commissioner’s decision appealed against and any other relevant documentation)

H: Please attach a settlement proposal (if any)

I: No. of pages attached to this form (if any)

J: Declaration:

I hereby apply that the above matter be admitted for resolution through the Alternative Dispute Resolution process and declare that;

- i. I have fully stated the grounds upon which ADR is being applied for; and**
- ii. I have provided/attached relevant documentation in support of my application.**

K: Completed by:

Full Name(s) _____ **Signature** _____ **Title** _____ **Date** _____



OFFICE OF THE DATA PROTECTION COMMISSIONER

P.O. BOX 30920-00100

NAIROBI

info@odpc.go.ke | www.odpc.go.ke