



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 0657 OF 2023

STEPHEN SHIBWECHÉ.....COMPLAINANT

-VERSUS-

AGA KHAN EDUCATION SERVICE.....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; 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. On 25th April 2023, this Office received a complaint from one Stephen Shibweche.

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. In the notification of the complaint filed against the Respondent, the Respondent was to provide: -
 - a) A response to the allegations made against it by the Complainant;
 - b) Any relevant materials or evidence in support of the Response in (a) above;
 - c) Details of how the Respondent collected, stored, and processed the Complainant's data;
 - d) The legal basis relied upon to process and engage with the Complainant and whether or how the Respondent will fulfill 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 complaint do not take place again;
 - f) The Respondent'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 other alleged contravention directed to its attention by data subjects;
 - g) Demonstration (by way of a 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.
5. On 22nd June 2023, this office vide its letter ref no. ODPC/CONF/1/5/Vol 1(309) sent a reminder to the Respondent reminding it to respond to the complaint filed against it.
6. On 30th June 2023, the Respondent filed its response to the complaint filed against it.
7. Upon receipt of the response, investigations were conducted as required by Regulation 13 (1) of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations 2021.
8. This determination is pegged 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 lawful and or permitted circumstances for processing of personal data.
10. The complainant alleges that the Respondent who was his former employer shared his personal data with another entity i.e. new employer without the Complainant's consent. The Complainant had terminated his contract with the Respondent (former employer) and had moved to another school (new employer). He was still under probation and the new employer was conducting background/reference checks on him before confirming his appointment as a teacher with the new employer.
11. In conducting its background/reference checks, the new employer wrote to the Respondent, the complainant's former employer, inquiring about the Complainant's performance and the validity and or authenticity of the pay slip that the Complainant had adduced with his new employer as evidence of the salary which he was receiving from Respondent, the Complainant's former employer.

C. THE RESPONDENT'S RESPONSE TO THE COMPLAINT

12. The response to the complaint was made vide a letter that was received and filed on 30th June 2023. The letter was forwarding the Respondent's substantive response to the Notification letter. The substantive response is dated 29th June 2023.
13. The Respondent stated that the complainant was employed by the Respondent on 2nd January 2020 as a mathematics/ Physic teacher for a period of two (2) years ending 31st December 2021. Upon expiry of his contract in 2021, his contract was renewed for a period of two(2) years. Which was to expire on 31st December 2023. He however resigned on his own volition on 2nd June 2022 and served the required three(3) months' notice until 2nd September 2022.

14. The Respondent stated that on 27th September 2022, the Respondent received an email requesting reference checks for two individuals, one being the Complainant, from Ms. [REDACTED], the Human Resource Manager, Premier Academy(the Complainant's new employer)
15. That on 1st November 2022, the Respondent's HR Officer, Ms. [REDACTED] reviewed the Complainant's personnel records and responded to the request stating that the Complainant was a committed employee whose performance was good and that he left after the serving notice.
16. Thereafter, on 7th December 2022, the Complainant's new employer wrote to the Respondent's HR attaching a March 2022 pay slip given to the new employer by the Complainant, requesting for confirmation of the salary details provided. Upon review of the Complainant's file, the Respondent's HR noted that the pay slip was a forgery. Consequently, on the same day, she responded to the Complainant's new employer confirming that the salary details were not correct, and advised the Complainant's new employer of the correct salary figures.
17. In response to the details of how the Respondent collected, stored, and processed the complainant's data; the Respondent responded that the information pertaining to the Complainant is contained in his employee file which contains among other records, the contract of employment and payslips. That the personal files are stored at the HR offices at the Head Office in Nairobi in lockable metal cabinets in a locked records registry. That the information is also contained in the Peoplesoft Software.
18. The Respondent stated that access to personnel files is restricted to HR staff only. The staff may access their respective file in the presence of authorized HR personnel and access to the software is restricted to HE and Payroll personnel on role-based access and protected with a password. The Respondent also stated that the individual payslips are restricted to individuals and are password protected.

19. The Respondent stated that the payment information was used to process the Complainant's monthly salary, terminal dues in the performance of the contract, and mandatory statutory deductions such as PAYE, NSSF, and NHIF. That the information related to the cost of the professional development course was collected from Cambridge International and is stored in electronic communications. That this information was used to facilitate reimbursement of the debt from the Complainant.
20. On the legal basis relied upon to process and engage with the Complainant and whether or how to fulfill the duty to notify under section 29 of the Act, the Respondent stated that the processing was done in accordance with the Employee Privacy Notice which was executed by the Complainant when he was still employed by the Respondent. The Respondent also stated and adduced evidence that before signing the Privacy Notice the Complainant attended a Data Protection Awareness Training.
21. On the request to request for a background and reference check, the Respondent stated that the request received by the Respondent for a background and reference check was not unusual. That during the recruitment process in any organization, applicants are required to submit various documents, including their CVs which contain, among other things, their work history and reference information. This information is verified through background and reference checks.
22. That responding to the background and reference checks is a matter of good faith and public interest since the process is aimed at ensuring that accurate information is presented by job applicants. That the process is so vital that a recruitment process is incomplete without it. Such checks may lead to the discovery of, among other things, the presentation of false and misleading information by a job applicant, relevant previous work and conduct history, criminal history that has a bearing on future employment, compliance with statutory requirements for certain positions, compliance with them when they seek similar information.
23. That it is customary to respond to such requests subject to the following:-

- a) The request is handled in a designated manner;
- b) Any information that is provided is correct (to avert defamation claims); and
- c) Disclosure is premised on an undertaking and promise of confidentiality.

24. The Respondent stated that the practice and procedure at the Respondent is that such requests are handled only by Authorized HR personnel.

25. That according to the email dated 27th September 2022, the Respondent's new employer expressly stated that "*All information shared herein will be handled with utmost confidentiality*". That it is on the basis of this promise and the assurance that the Respondent's new Employer had the Complainant's consent in undertaking background checks that the Respondent responded to the request.

26. That the Respondent confirmed that the Complainant's performance was good and that this demonstrates that the Respondent was not in any way malicious or vindictive. That when the Respondent was asked about the Complainant's pay, it noted that the information provided by the Complainant was false and as a matter of fact, the payslip was a forgery. This information was disclosed in confidence.

27. The Respondent attributed to the vital role of background and reference checks stating that processing personal data through reference checks is a matter of public interest, more so when the outcome is to bring criminal activity to light. That in such circumstances, a data subject's consent is not required. Making and responding to background and reference checks also protects the legitimate interests of an organization. In addition to this, the Respondent went further to quote sections 30 and 51(2) of the Data Protection Act, 2019 & Regulations 5, 55, and 56 of the Data Protection (General) Regulations 2021

28. The Respondent also stated that bringing to light the commission of a criminal act is in the public interest and does not require the Complainant's consent and it is in furtherance of the Respondent's legitimate interests. That the Respondent disclosed the correct information regarding the Complainant's pay following the undertaking by his new employer to keep the information confidential.

29. With respect to the training costs incurred by the Complainant, the Respondent averred that on 8th December 2020, the Complainant signed an Addendum to the Respondent's HR manual. The Respondent stated that the addendum contains a clause that permits the Respondent to process the Complainant's personal data for among other things, purposes relating to the performance of the contract of employment. In addition, the Respondent stated that having failed to settle the debt, despite committing to do so, the Respondent was at liberty to take steps for thereof, including requesting the Complainant's new employer for assistance.

D. ISSUE FOR DETERMINATION

- i. Whether the Complainant's personal information/ data was processed in accordance with the law.

E. ANALYSIS AND DETERMINATION

I. WHETHER THE COMPLAINANT'S PERSONAL INFORMATION/ DATA WAS PROCESSED IN ACCORDANCE WITH THE LAW.

30. As earlier stated this complaint relates to the processing of personal data wherein the Complainant alleges that his data was processed without his consent while the Respondent counters the allegations by submitting that it processed the Complainant's data with his consent and in the performance of its public interest. The kind of personal data herein relates to the pay slip details where the Respondent a former employer of the Complainant was requested to verify the Payslip that the Complainant had adduced with his new employer to be accurate or accurate or a forgery.

31. Section 30 of the Data Protection Act provides the lawful bases for the processing of personal data. It provides:-

30. Lawful processing of personal data

(1) A data controller or data processor shall not process personal data, unless –

(a) the data subject consents to the processing for one or more specified purposes; or

(b) the processing is necessary-

- (i) for the performance of a contract to which the data subject is a party or in order to take steps at the request of the data subject before entering into a contract;**
- (ii) For compliance with any legal obligation to which the controller is subject;**
- (iii) In order to protect the vital interests of the data subject or another natural person;**
- (iv) For the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;**
- (v) The performance of any task carried out by a public authority;**
- (vi) For the exercise, by any person in the public interest, of any other functions of a public nature;**
- (vii) For the legitimate interests pursued by the data controller or data processor by a third party to whom the data is disclosed, except if the processing is unwarranted in any particular case having regard to the harm and prejudice to the rights and freedoms or legitimate interest of the data subject; or**
- (viii) For the purpose of historical, statistical, journalistic, literature, and art or scientific research.**

(2) Further processing of personal data shall be in accordance with the purpose of collection.

(3) A data controller who contravenes the provisions of sub-section (1) commits an offence.

32. considering the complaint at hand relates to the issues around consent and public interest, this office will focus on these two as lawful bases for the processing of personal data.

33. The Black's Law Dictionary, 10th Edition defines consent as "agreement, approval, or permission as to some act or purpose, especially given voluntarily by a competent person.

34. Section 2 of the Act on the other hand 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.
35. The definition of the Act details the minimum criteria of or for consent to be that it must be certain that the individual has consented, and what they have consented to. This certainty requires more than just a confirmation that they have read and understood the terms and conditions also there must be a clear signal that they agree or have agreed to what is there. The unambiguity of the consent also links in with the requirement that consent must be verifiable to the extent that one must be able to demonstrate that someone has consented to the consent.
36. From a combined reading of the above definitions, it is apparent that valid consent is a product of conscious decision-making and requires affirmative action. Therefore, knowledge of the subject of consent is required to make a decision for processing or not. Furthermore, valid consent is not a product of inactivity, as consent requires free will and communication by the person giving consent. Given that consent is a data subject determinant, it must be obtained before any processing and it must comply with the relevant data protection laws.
37. The Act goes further to state the conditions of consent. It states as follows with regard to the conditions of consent:-

32. Conditions of consent

(1) A data controller or data processor shall bear the burden of proof for establishing a data subject's consent to the processing of their personal data for a specified purpose.

(2) Unless otherwise provided under this Act, a data subject shall have the right to withdraw consent at any time.

(3) the withdrawal of consent under sub-section(2) shall not affect the lawfulness of processing based on prior consent before its withdrawal.

(4) In determining whether consent was freely given, account shall be taken of whether, among others, the performance of a contract, including the provision of a service, is conditional on the consent of the processing of personal data that is not necessary for the performance of that contract.

38. From the evidence adduced to this office it is evident that at all material times in the processing of the Complainant's Personal data, there was consent. The Respondent has adduced a duly executed consent form by the Complainant. Also, from the data protection awareness training form, it is evident that the Complainant attended a Data Protection Awareness training before the execution of the Consent form. As such, it is evident that he was aware of what he was signing.

39. When the Complainant was still employed by the Respondent he had executed a consent form in the form of an employee Privacy Notice. In fact, as can be seen from the evidence, the Complainant attended a data protection awareness training prior to the signing of the Consent form. There is evidence of the Complainant attending the training on 20th July 2022 as shown by the attendance list adduced by the Respondent.

40. From the Respondent's Employee Privacy Notice that the Complainant had signed and consented, it enumerates the situations in which the Respondent will process the Complainant's personal information. Among the many situations that are enumerated in the privacy notice where the Complainant's personal information can be processed is the prevention of fraud. The Complainant adduced to his new employer a pay slip purporting to be from his former employer, the Respondent herein. When the Respondent was requested to verify the Payslip by the Complainant's new employer, it was well within the Respondent's boundary and mandate to verify the payslip in order to prevent fraud. The payslip was being presented as a document emanating from the Respondent.

41. In addition, to the already established consent that was there, the Respondent also relied on the existence of public interest for the processing of the Complainant's personal data in the carrying out of the background and or reference checks.
42. On this, this office would like to note that there is no specific definition of public interest and its definition is dependent on a case-to-case basis. In the context of employment, in this case, the Complainant is a teacher and was seeking employment as a teacher, carrying out background checks/ reference checks on the teacher is very important. This office appreciates the crucial role the teachers play in the life of our children. In a school setting, they are the primary caregivers, and as such the parents of the children would also like to know more about the teachers with whom their children are left with. As such it is in the public interest to conduct background checks/ references. The Complainant is a teacher, it is in the public interest that teachers uphold morality and integrity. There is an expectation that the teacher would act in good faith.
43. As regards the public interest, it is important to note that in addition to the foregoing, the under the general exemptions of the Act as envisaged under section 51(2) (b) of the Data Protection Act, processing of personal information for the sake of public interest is one of the exempted circumstances of processing personal information where the provisions of the Act do not apply.
44. It is also a fact as a practice in employment, a prospective employee is required to obtain clearances from state agencies and to provide references. All these are measures taken to check the credibility of the prospective employee. This is in line with Regulation 55 of the Data Protection (General) Regulations 2021, which also provides that for the purposes of section 51(2)(b) of the Act, the processing of personal data is exempted from the Act on the grounds of public interest where such processing exists as a permitted generation situation.

45. From the foregoing, it is evident that there existed a duly executed consent form and the processing of the Complainant's personal information was well in the interest of the public in the context of employment matters.


46. It is therefore our finding that the Respondent had a lawful basis for the processing of personal data.

F. FINAL DETERMINATION

47. In the ultimate the Data Commissioner, therefore, makes the following final determination;

- i. The Complainant lacks merit and as such it is dismissed.
- ii. Parties have the right to appeal this determination to the High Court of Kenya.

DATED at **NAIROBI** this 21st day of July 2023.



**IMMACULATE KASSAIT, MBS
DATA COMMISSIONER**