



OFFICE OF THE DATA PROTECTION COMMISSIONER
IN THE SUO MOTO INVESTIGATION NO. 0002 OF 2024
ON

ALPHAX ACADEMY ELDORET.....RESPONDENT

***(DETERMINATION ON THE SUO MOTO INVESTIGATION AS TO THE
PROCESSING OF MINORS' PERSONAL DATA SUBJECT TO SECTIONS 25, 26,
27, 29, 30, 32, 37 AND 41 OF THE DATA PROTECTION ACT 2019)***

DETERMINATION

(Pursuant to Section 8(1)(f), 9(1) (a), 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. On 3rd September, 2024, the Office instituted a *suo moto* investigation, being, ODPC *Suo Moto* Investigation NO. ODPC/SM/0002/2024, on its own initiative into Alphax Academy, taking cognizance of the public interest generated by its personal data processing practices specifically pertaining to minors' personal data.

B. LEGAL BASIS

2. Article 31(c) and (d) of the Constitution of Kenya 2010 provides for the right to privacy. Consequently, as an effort to further guarantee the same, the Data Protection Act, 2019 (hereinafter as 'the Act') was enacted.

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3. The Office of the Data Protection Commissioner (hereinafter 'this Office' 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 9(1)(a) of the Act provides that the Office shall have the power to conduct investigations on its own initiative, or on the basis of a complaint made by a data subject or a third party.
5. This determination is premised on the provisions of Regulation 14 of the Data Protection (Complaint Handling Procedure and Enforcement) Regulations, 2021 (hereinafter as '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 INVESTIGATION

6. Alphax Academy Eldoret (hereinafter the 'Respondent') is an educational institution that provides learning to minors. As a learning institution, the Respondent processes the personal data of minors in the course of its operations. Given the sensitive nature of minors' data, as defined under the Act, the institution is subject to strict compliance with data protection laws, particularly regarding lawful processing, parental consent, data security, and privacy safeguards.
7. Concerns have been brought to the attention of this Office regarding the processing and use of minors' personal data by the Respondent. Specifically, these concerns pertain to the unlawful use of collected data for commercial purposes without a valid legal basis.

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8. Pursuant to Regulation 11 of the Enforcement Regulations, the Office notified the Respondent of the *suo moto* investigations *vide* a letter dated 3rd September, 2024 and referenced ODPC/CONF/1/5 VOL II(162) and received on 10th September, 2024. In the notification, the Respondent was asked to provide this Office with the following:
- a. A response to the alleged violations made against them and a contact person who can provide further details as regards this investigation;
 - b. Any relevant materials or evidence in support of the response;
 - c. The mitigation measures adopted or being adopted to address the alleged violations and to ensure that such occurrences mentioned do not take place again;
 - d. Documentation outlining the organization's data processing activities;
 - e. Details of the security measures implemented to safeguard personal data; and
 - f. Any relevant policies and procedures related to data protection.
9. The Respondent failed to provide a response to the concerns raised, thereby leaving the allegations unchallenged and unrefuted.
10. This determination is therefore as a result of an analysis of the preliminary investigation and the investigations conducted by the Office.

D. NATURE OF THE INVESTIGATION

11. The Office conducted a preliminary investigation based on publicly available information and concerns raised regarding potential violations of the Data Protection Act by the Respondent. These concerns specifically related to the unlawful processing and use of minors' personal data for commercial purposes without a valid legal basis. Despite being given an opportunity to respond, the Respondent remained non-responsive, leaving the allegations unchallenged and unrefuted.

E. SUMMARY OF RELEVANT FACTS AND EVIDENCE ADDUCED

I. THE SUO MOTO INVESTIGATION

12. According to preliminary investigations by the Office, there was likelihood of non-compliance in the Respondent's processing operations, particularly on how the Respondent used, handled and stored personal data within its custody as a data

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controller. The alleged violations against the Respondent were communicated to the Respondent *vide* the notification referenced hereinbefore and included: -

- i) Lack of lawful basis for processing contrary to Section 25(b) and 30 of the Act to *wit* –
 - a. the data being collected is not processed in accordance with the right to privacy of the data subjects;
 - b. the data collected is used for illegitimate purposes which are incompatible with the purposes of collection; and
- ii) Failure to process personal data in a transparent manner and failure to fulfil the duty to notify contrary to Section 25(b) and 29 of the Act to *wit:-*
 - a. Failure to provide clear and accessible information to data subjects about how their personal data is being processed;
 - b. Failure to notify the data subjects of the collection, processing, repurposing and sharing of their personal data.
- iii) Inadequate security measures to protect personal data contrary to Sections 41, 42 of the Act as read with Regulation 32 of the Data Protection (General) Regulations 2021 to *wit-*
 - a. lack of appropriate technical and organizational measures to ensure the data collected is protected by design and default;
 - b. Failure to implement security measures such as encryption, access controls and regular security assessments.
- iv) Violation of the data minimization principle contrary to Section 25(d) of the Act as read with Regulation 33 of Data Protection (General) Regulations 2021 to *wit* –
 - a. Collecting excessive or unnecessary personal data beyond what is required for the specified purposes.
 - b. Failure to adequately anonymise or pseudonymize data where possible
- v) Violation of the storage limitation principle (retention period if any) contrary to Section 25(g) of the Act as read with Regulation 35 of Data Protection (General) Regulations 2021 to *wit* –

- a. Lack of a clear data retention and deletion policy
- b. Retaining personal data for longer than the period necessary to fulfil the purpose for which it was collected.

II. THE RESPONDENT'S RESPONSE

13. The Respondent's failure to respond to the concerns raised resulted in the allegations remaining uncontested and unaddressed.

F. INVESTIGATIONS UNDERTAKEN

14. The Office conducted a site visit at the Respondent's premises on the 3rd December, 2024.

15. During the site visit, it was established that:

- i. The Respondent failed to submit a statement of response to the Office regarding the notification of the *suo moto* investigation.
- ii. The Respondent lacked any documentation to support its defense against the allegations.
- iii. The Respondent was found to be processing minors' personal data for commercial purposes without obtaining the requisite consent, in accordance with Sections 27 and 32 of the Act.
- iv. The Respondent was granted an extension until 31st December 2024 to provide a response to the allegations. However, to date, it has remained unresponsive and non-compliant.

G. ISSUES FOR DETERMINATION

16. In light of the above, the following issues fall for determination by this Office:

- i. Whether the Respondent has complied with the Act and its attendant regulations.
- ii. Whether there are any remedies to issue with respect to the *suo moto* investigation.

I. WHETHER THE RESPONDENT HAD COMPLIED WITH THE ACT AND ITS ATTENDANT REGULATIONS.

17. It Section 25 of the Act provides for the principles of data protection as follows:-

"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) Processed lawfully, fairly, and in a transparent manner in relation to any data subject;*
- c) Collected for explicit, specified, and legitimate purposes and not further processed in a manner incompatible with those purposes;*
- d) adequate, relevant, limited to what is necessary in relation to the purposes for which it is processed;*
- e) collected only where a valid explanation is provided whenever information relating to family or private affairs is required;*
- 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;*
- g) kept in a form which identifies the data subjects for no longer than is necessary for the purposes which it was collected; and*
- h) not transferred outside Kenya, unless there is proof of adequate data protection safeguards or consent from the data subject.*

18. Section 30 (1) (a) of the Act provides that a data controller or data processor shall not process personal data unless the data subject consents to the processing for one or more specified purposes.

19. 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.

20. 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.

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There must be a clear signal that they agree or have agreed to the processing. The unambiguity of the consent further links in with the requirement that consent must be verifiable to the extent that one must be able to demonstrate that the data subject consented to the processing.

21. 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. It should be demonstrable and capable of being proven.
22. Section 32 of the Act goes further to state the conditions of consent. It states as follows concerning the 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. (emphasis ours)

23. Section 27(a) of the Act provides, that a right is conferred where a data subject is a minor, may be exercised by a person who has parental authority or by a guardian. Regulation 13(2) of the Data Protection (General) Regulations, 2021 further provides; where the data subject is a child, a data controller or data processor shall ensure that

a) a person exercising the right is appropriately identified;

b) profiling of a child that is related to direct marketing is prohibited; and,

c) the parent or guardian is informed of the inherent risks in processing and the safeguards put in place.

24. For further emphasis, Regulation 13(3) of the Data Protection (General) Regulations, 2021 expressly provides that: where a data controller or a data processor is uncertain as to the existence of a relationship between the duly authorized person and the data subject, the data controller or data processor may restrict the request of exercising a right on behalf of the data subject until evidence to the contrary is adduced.

25. Section 37(1) of the Act states that, "a person shall not use, for commercial purposes, personal data obtained pursuant to the provisions of this Act unless the person –

a) Has sought and obtained express consent from a data subject; or

b) Is authorised to do so under any written law and the data subject has been informed of such use when collecting the data from the data subject."

26. Regulation 14(1) of the General Regulations provides the interpretation of 'commercial purposes' and provides that for the purposes of Section 37(1) of the Act, *a data controller or data processor shall be considered to use personal data for commercial purposes where personal data of a data subject is used to advance commercial or economic interests, including inducing another person to buy, rent, lease, join, subscribe to, provide or exchange products, property, information or services, or enabling or effecting directly or indirectly, a commercial transaction.*

27. Regulation 15 of the General Regulations sets out the permitted commercial use of personal data and states that, *"a data controller or data processor may use personal data, other than sensitive personal data, concerning a data subject for the purpose of direct marketing where—*

a) the data controller or data processor has collected the personal data from the data subject;

b) the data subject has consented to the use or disclosure of the personal data for the purpose of direct marketing;

28. Section 29 of the Act provides for the Respondents duty to notify and provides that *"a data controller or data processor shall before collecting personal data, in so far as practicable, inform the data subject of:-*

- a) the rights of data subject specified under section 26;*
- b) the fact that personal data is being collected;*
- c) the purpose for which the personal data is being collected;*
- d) the third parties whose personal data has been or will be transferred to, including details of safeguards adopted;*
- e) the contacts of the data controller or data processor and on whether any other entity may receive the collected personal data;*
- f) a description of the technical and organizational security measures taken to ensure the integrity and confidentiality of the data;*
- g) the data being collected pursuant to any law and whether such collection is voluntary or mandatory; and*
- h) the consequences if any, where the data subject fails to provide all or any part of the requested data."*

29. Based on the foregoing and from this Office's investigations, it was established –

- a) The Respondent failed to demonstrate compliance with the data protection principles enshrined under Section 25 of the Act. Specifically, the Respondent did not establish that minors' personal data was processed lawfully, fairly, and transparently, as it lacked a valid legal basis for using such data for commercial purposes. Furthermore, the Respondent failed to provide documentation demonstrating that the data was collected for explicit, specified, and legitimate purposes or that it had obtained the requisite consent as mandated by law. The absence of appropriate safeguards to ensure data accuracy, security, and processing limitation further underscores the Respondent's non-compliance.
- b) The Respondent failed to establish compliance with Section 32 of the Data Protection Act, which sets out the conditions for obtaining valid consent.

Notably, the Respondent did not provide proof that it had obtained freely given, informed, and explicit consent from minors' parents or legal guardians before processing their personal data for commercial purposes, as required under Section 32(1). Moreover, the Respondent failed to demonstrate that it had mechanisms allowing data subjects or their parents/guardians to withdraw consent at any time, in violation of Section 32(2). There was also no evidence to suggest that the Respondent had assessed whether the provision of educational services was improperly conditioned on granting consent for data processing unrelated to the core purpose of education, contrary to Section 32(4).

- c) The Respondent failed to fulfill its duty to notify data subjects as required under Section 29 of the Act. As a data controller and processor handling minors' personal data, the Respondent was legally obligated to inform data subjects or in this case, their parents or legal guardians of the collection, purpose, and intended use of the data prior to processing. However, there was no evidence to indicate that the Respondent had provided such notifications. Specifically, the Respondent did not demonstrate compliance with its duty to:
- i. Inform data subjects of their rights under Section 26 of the Act (Section 29(a));
 - ii. State the purpose of collection and whether it was mandatory or voluntary (Sections 29(c) & 29(g));
 - iii. Provide details of third parties to whom the data was or would be transferred, as well as the safeguards in place (Section 29(d));
 - iv. Explain the technical and organizational measures to ensure the security and confidentiality of the minors' data (Section 29(f)); and
 - v. Inform data subjects of the consequences of failing to provide the requested data (Section 29(h)).

30. Pursuant to Section 57(1) and (2) of the Act, the Office requested the Respondent to furnish relevant documents, records, articles, and a written statement regarding the *suo moto* investigation. Additionally, the Respondent was required to provide these materials for the purposes of the investigation. However, the Respondent's failure to comply with this request constitutes a direct violation of Section 57(3) of the Act, which stipulates that a person who, without reasonable excuse, fails or refuses to comply with a notice, or furnishes false or misleading information to the Data Commissioner, commits an offence. The Respondent's non-responsiveness not only undermines the investigation process but also amounts to non-compliance with statutory obligations under the Act.

31. Based on the foregoing, the Respondent has failed to demonstrate that its processing activities, particularly the processing of minors' personal data, comply with the Act and its attendant regulations. Accordingly, it is the finding and determination of this Office that the Respondent is non-compliant to the extent drawn above.

II. WHETHER THERE ARE ANY REMEDIES TO ISSUE WITH RESPECT TO THE SUO MOTO INVESTIGATION

32. Pursuant to Regulation 14 (2) of the Enforcement Regulations, a determination shall state the remedy directed by the Office. The remedies are provided for in Regulation 14 (3) of the Enforcement Regulations.

33. Having found that the Respondent failed to fulfil their obligations under the Act and attendant regulations, **an Enforcement Notice shall issue against the Respondent** pursuant to Section 58 of the Act and Regulation 16 of the Enforcement Regulations.

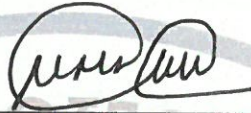
H. FINAL DETERMINATION

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

- i. The Respondent is non-compliant in respect of this *suo moto* investigation.
- ii. An Enforcement is hereby issued to the Respondent.

- iii. The Respondent has the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at **NAIROBI** this 16th day of December 2025.



IMMACULATE KASSAIT, SC, MBS
DATA COMMISSIONER

