



OFFICE OF THE
DATA PROTECTION
COMMISSIONER



A CALL FOR COMMENTS ON NOTICE OF PRESCRIPTION OF ADDITIONAL CATEGORIES OF SENSITIVE PERSONAL DATA PURSUANT TO SECTION 47 OF THE DPA, 2019

WHEREAS Article 31 of the Constitution of Kenya, 2010 guarantees every person the right to privacy, including the right not to have information relating to their family or private affairs unnecessarily required or revealed;

WHEREAS The Data Protection Act, No. 24 of 2019 (the Act) was enacted to give effect to Article 31 of the Constitution, and establishes the Office of the Data Protection Commissioner as the authority responsible for the regulation of the processing of personal data in Kenya;

WHEREAS Section 47(1) of the Act provides that the Data Commissioner may prescribe further categories of personal data as sensitive personal data;

WHEREAS Section 47(2) of the Act confers upon the Data Commissioner the power to specify any further grounds on which such prescribed categories of sensitive personal data may be processed, having regard to: (a) the risk of significant harm that may be caused to a data subject by the processing of such category of personal data; (b) the expectation of confidentiality attached to such category of personal data; (c) whether a significantly discernible class of data subjects may suffer significant harm from the processing of such category of personal data; and (d) the adequacy of protection afforded by ordinary provisions applicable to personal data;

AND WHEREAS Kenya is a destination country for significant volumes of Cross-Border Transfers of personal data from multiple jurisdictions across the world, including jurisdictions that operate data protection frameworks that recognise categories of sensitive personal data beyond those expressly enumerated in the Act;

WHEREAS Originating Laws in Jurisdictions of Origin recognise, as sensitive personal data or special categories of personal data, categories that include trade union membership and political affiliation;

WHEREAS Where personal data that is treated as sensitive under the Originating Law of the Jurisdiction of Origin is transferred to Kenya without equivalent protection being applied in Kenya, the data subject suffers a diminution in the protection of their personal data and a corresponding increase in the risk of harm through disclosure or misuse;

WHEREAS The Data Commissioner has considered the risk of significant harm that may be caused to data subjects by the processing in Kenya of trade union membership and political affiliation data received into Kenya through Cross-Border Transfer, including the risk of discrimination in employment, political targeting, intimidation and reputational harm;

WHEREAS The Data Commissioner has considered the reasonable and legitimate expectation of confidentiality that attaches to trade union membership and political affiliation data, particularly where data subjects have had that expectation formed and reinforced by the Originating Law of the Jurisdiction of Origin;

WHEREAS Trade union members and politically affiliated individuals constitute significantly discernible classes of data subjects;

WHEREAS The prescription of trade union membership and political affiliation as sensitive personal data, in respect of Cross-Border Transfers from jurisdictions whose Originating Law treats such data as sensitive, is necessary, proportionate and consistent with Kenya's obligations and interests as a destination country for international data flows;

NOW THEREFORE, the Data Commissioner, having carefully considered the criteria set out in Section 47(2) and being satisfied that the prescription is necessary for the protection of the fundamental rights and freedoms of data subjects and in exercise of the power conferred by Section 47(1) of the Act, hereby prescribes as follows:



1. Additional Categories of Sensitive Personal Data

The following categories of personal data are hereby prescribed as sensitive personal data only where categorized as such in the Jurisdiction of Origin:

- a. **Political affiliation** – any information that reveals or relates to a data subject's political opinions, membership or affiliation with a political party or movement, participation in political activities, or any other information from which political leanings can reasonably be inferred.
- b. **Trade union membership** – any information that reveals or relates to a data subject's membership in, affiliation with, or activities in a trade union or labour organization, or any other information from which trade union involvement can reasonably be inferred.

2. Application

The prescription in Clause 1 applies only where:

- a. the personal data in question is transferred to Kenya by way of a CrossBorder Transfer;
- b. the Originating Law of the Jurisdiction of Origin, at the time of the CrossBorder Transfer, treats, designates or classifies data revealing trade union membership or political affiliation (or data of equivalent character, however described) as sensitive personal data or special category of personal data.

3. Compliance

All data controllers and data processors shall comply with the provisions of the Act, and the attendant Regulations, applicable to the processing of sensitive personal data.

4. Enforcement

Non-compliance with the requirements applicable to sensitive personal data (including those prescribed herein) shall attract the enforcement measures and penalties as provided under the Act and the attendant Regulations.

COMMENTS/FEEDBACK

We welcome your comments, suggestions, observations and recommendations on this document as we continue to strengthen our approach and ensure that it responds effectively to the needs of our stakeholders. Please share your feedback with **ONLINE**, or reach us via public.participation@odpc.go.ke.



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