

Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021

LEGAL ALERT

ALGERIA

ETHIOPIA

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MADAGASCAR

MALAWI

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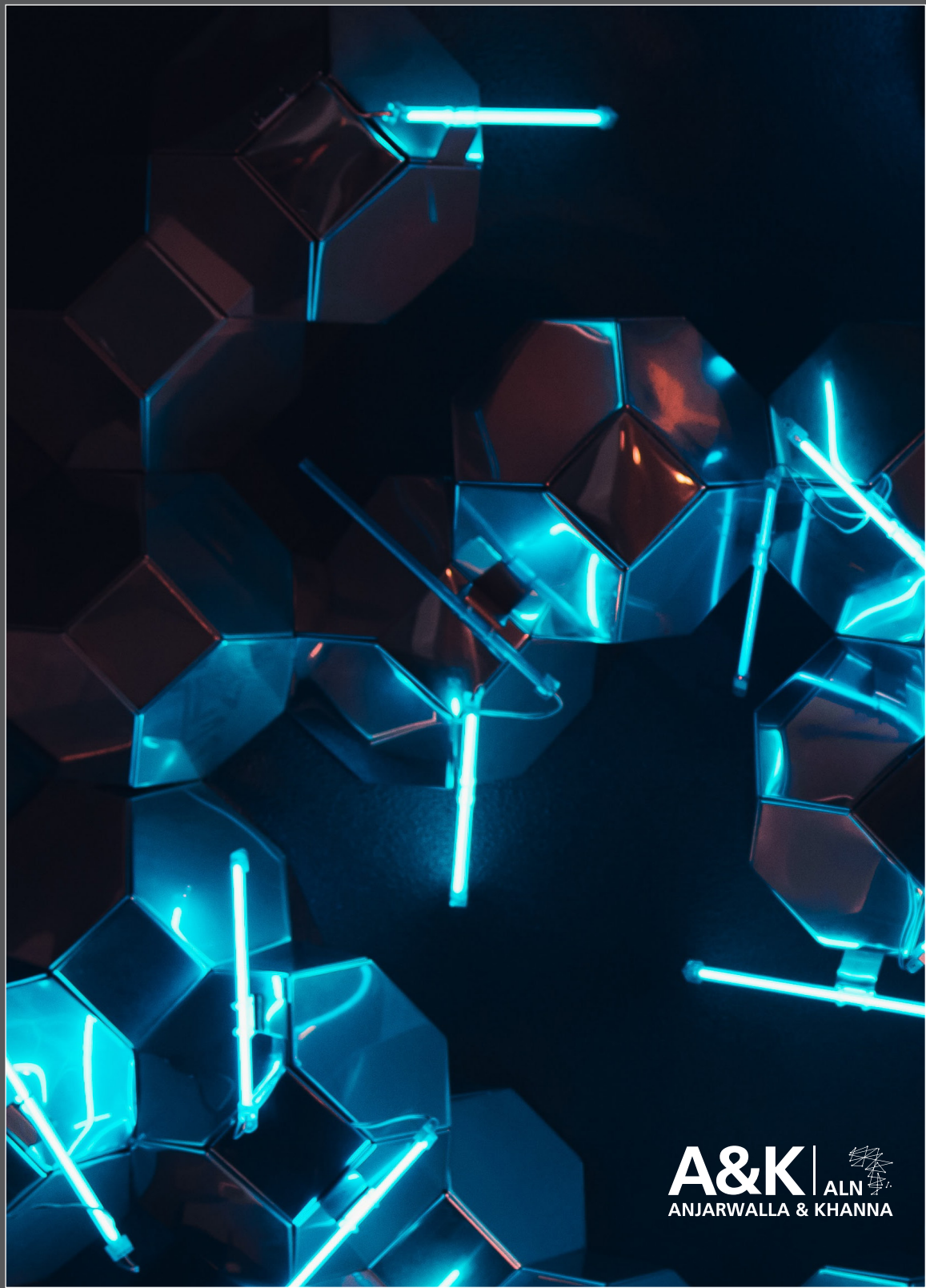
TANZANIA

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25 February 2022

Introduction

In 2021, the Office of the Data Protection Commissioner (the ODPC) intervened in two separate instances where Kenyans complained of the handling of their personal data. The first instance involved the unauthorised registration of Kenyans as members of political parties on the Office of the Registrar of Political Parties' register, while the second featured unauthorized disclosures of a hotel's guest list.

The ODPC handled these complaints within the framework of the Data Protection Act (the DPA). However, the necessary regulations to give practical effect to the complaints handling procedure were not in place. On February 11, 2022, the Cabinet Secretary for Information Communication and Technology, Innovation and Youth Affairs (the CS) issued the Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021 ([the Complaints Regulations](#)). The Complaints Regulations have been issued to facilitate a fair and expeditious complaints mechanism administered by the Office of the Data Protection Commissioner (ODPC).

The Complaints Regulations clarify the ODPC's powers of investigation and enforcement and also for alternative dispute resolution. We set out the key highlights of the Complaints Regulations below.

Procedure for Lodging, Admission, and Response to Complaints

(a) Lodging Complaints

A data subject who is aggrieved by any matter arising under the DPA may lodge a complaint with the ODPC. A complaint may be lodged orally, electronically or by any other appropriate means by the complainant in person (or anonymously), by a person acting on his or her behalf, or by any person authorised by law to act on behalf of a data subject. The ODPC may also order a person to be enjoined as a party to a complaint upon its own motion, or by way of an application lodged by either the complainant or the respondent. Additionally, a person who has sufficient interest in the outcome of a complaint may apply to the ODPC for leave to be enjoined in the proceedings prior to the hearing of the complaint.

There are no fees payable for lodging of a complaint. Once a complaint is received, the ODPC must acknowledge receipt of it within 7 days, register the complaint and undertake a preliminary screening to ascertain if it warrants further action.

A complainant may withdraw a complaint at any time before its determination. Where two or more similar complaints are lodged against the same person, the ODPC may, with the consent of the complainants, either consolidate them or treat one as a test complaint while staying the other pending resolution of the test complaint. For example, if multiple complainants allege that a single data controller or data processor violated their privacy rights in a similar manner, the ODPC may either merge all the complaints or pursue one of the complaints as representative of the rest.

Upon admission of a complaint, the ODPC is required to notify the respondent of the complaint within 21 days. The notice to the respondent of the complaint must specify options available to resolve a complaint including determining the complaint through alternative dispute resolution mechanisms specified in the DPA and the Complaints Regulations.

The respondent is then required to either make representations in its defence, review the complaint with a view to resolving it summarily to the satisfaction of the complainant, or provide a response with any information that may be requested by the ODPC.

Where a respondent fails to respond to a notice of complaint, the ODPC may determine the complaint in accordance with the DPA and the Complaints Regulations.

(b) Investigative Powers

In investigating a complaint, the ODPC has similar powers to a quasi-judicial entity and may issue summons, examine persons, administer oaths, request disclosure of evidence, and obtain court warrants to search and seize relevant material.

In conducting investigations, the ODPC is to be guided by the provisions of the Fair Administrative Action Act, 2015, which provide for due process. Upon concluding an investigation, the ODPC must make a determination, and may:





- i. issue an enforcement notice to the respondent in accordance with the DPA and the Complaints Regulations;
- ii. issue a penalty notice imposing an administrative fine where a respondent fails to comply with an enforcement notice;
- iii. dismiss the complaint where it lacks merit;
- iv. recommend prosecution of the respondent; or
- v. make an order for compensation to the data subject by the respondent.

Proceedings before the ODPC shall be conducted in Kiswahili, English, or Kenyan Sign Language. If a party cannot speak or understand the language of proceedings, the service of an interpreter is to be provided by the ODPC. The findings of an investigation must be communicated within seven days of concluding the investigation.

The decision of the ODPC is binding and can be enforced as a court order. Additionally, where the complaint is to be determined through negotiations, mediation or conciliation, the provisions of the Complaints Regulations shall apply.

Enforcement

The ODPC may issue an enforcement notice which serves to inform a data controller or data processor of its non-compliance, and directs it to comply within a certain period, failure to which the ODPC will take further action. A party may apply to the ODPC for a review of an enforcement notice issued against it. Subject to the DPA, a person may also appeal to the High Court against a decision arising out of the enforcement of the notice within thirty (30) days.

A penalty notice on the other hand serves to impose an administrative fine on a data controller or data processor which is found to be non-compliant. A penalty notice would follow an enforcement notice where a data controller or data processor has not remedied its non-compliance as directed by the ODPC. In addition to the administrative fines, a penalty notice may impose a continuing fine of not more than KES 10,000 per day for each breach identified until the breach is rectified. The ODPC shall enforce or take action to recover a penalty:

- i. upon the lapse of the period specified in the penalty notice for payment of the penalty;
- ii. on the final determination of any appeal against the penalty notice; or
- iii. on the lapse of the period given to appeal against the penalty.

The administrative fines under the DPA and the Complaints Regulations are significantly lower than those of other jurisdictions such as the European Union and the United Kingdom, with the highest fine being KES 5 million. By contrast, in late 2020, Commission Nationale de l'Informatique et des Libertés (France) issued Amazon a fine of 746 million Euros after Amazon allegedly failed to get cookie consent on its website, and months prior to the Amazon fine, the Ireland Data Protection Commissioner fined WhatsApp 225 million Euros after determining that WhatsApp had failed to properly explain its data processing practices in its privacy notice.

Conclusion

The ODPC has wide-ranging investigative and enforcement powers. With the Compliance Regulations in force as from February 11, 2022, we expect to see many more complaints being lodged which experience will pave the way for more clarity and guidance on the role that the ODPC will play in the complaints process and how it will pursue its mandate.

If you need any advice in relation to the General Regulations, please do not hesitate to reach out to our Data Protection Team (dataprotectionteam@africalegalnetwork.com)



Key contacts

Should you require more information, please do not hesitate to contact:



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