

DATA PROTECTION AND THE USE OF INDEPENDENT AGENTS: LIABILITY FOR UNSOLICITED MARKETING

Introduction

The Data Protection Act, 2019 imposes obligations on data controllers to ensure that personal data is processed only on a lawful basis, including where it is used for commercial or marketing purposes. Where a data controller engages third-party agents to carry out marketing activities on its behalf, the question of liability for breaches committed by those agents becomes particularly significant.

The recent determination in **Ojowi Okwemba Charles v Premier Credit Limited, ODPC Complaint No. 1977 of 2025**, issued by the Office of the Data Protection Commissioner, examines the boundaries of a data controller's liability where its independent agents act outside the scope of their contractual mandate in processing a data subject's personal data for unsolicited marketing.

Background

The Complainant, Ojowi Okwemba Charles, lodged a complaint with the Office of the Data Protection Commissioner (ODPC) on 5th December 2025, alleging that Premier Credit Limited (the Respondent) had sent him unsolicited promotional marketing messages without his consent or any other applicable lawful basis.

The Complainant confirmed that he had no prior or existing commercial relationship with Premier Credit, yet the Respondent's agents had continuously bombarded him with promotional messages soliciting him to take up a credit facility.

The Complainant provided screenshots of the unsolicited SMS texts as evidence and sought that the Respondent be fined for the breach.

Upon receiving the complaint, the ODPC notified Premier Credit of the allegations via a letter dated 19th January 2026, informing the Respondent that if the Complainant's allegations were true, they would constitute a violation of various provisions of the Data Protection Act, 2019.

The Respondent was required to provide, among other things: a response to the allegations; supporting evidence; the lawful basis relied upon for processing the Complainant's personal data; an explanation of how data subjects may exercise their rights; and the mitigation measures taken or being adopted to prevent recurrence. On 11th February 2026, Premier Credit submitted its response to the ODPC.

In its response, Premier Credit clarified that it engages independent sales agents to market its products and services to potential customers, and that such agents operate under an Independent Sales Agent Agreement and a Data Processing Agreement, which require compliance with the company's data protection policy and the Data Protection Act, 2019.

The Respondent stated that the Complainant's personal data (phone number and name) did not exist in the company's own database and that the agents responsible had processed the Complainant's data without instructions from the company.
The Respondent maintained that the agents had deviated from the confines of their contractual agreements and, accordingly, should be held personally liable.

Premier Credit further demonstrated that upon becoming aware of the complaint, it had initiated internal disciplinary proceedings against the two agents responsible — Davy Jebiwott Kemboi and Bridget Muthengi — and subsequently terminated their Independent Sales Agent Agreements.

Determination

The ODPC framed two issues for determination: first, whether the Respondent fulfilled its obligations under the Act; and second, whether the Complainant was entitled to any remedies under the Act and its attendant Regulations.

On the question of unlawful processing, the Office anchored its analysis on Section 37(a) of the Act, which prohibits the use of personal data for commercial purposes unless express consent has been obtained from the data subject, and on Regulation 15(1)(c) of the Data Protection (General) Regulations, which permits the use of personal data for direct marketing only where the data subject has consented to such use.

The evidence before the ODPC did not demonstrate that the Complainant had been informed of the source of his personal data, the purpose for which it was being processed, or his right to object, an omission that amounted to a violation of the Complainant's right to be informed.

Significantly, the evidence showed that even after the Complainant replied to the agents' SMS messages expressing his disinterest and requesting that the communications cease, marketing messages continued. One such message, received after his objection, read: *"Sorry for texting without your consent, Premier Credit offers check off loans for Government employees within 24 hours…."*

This was particularly telling: the message acknowledged the absence of consent yet continued to market the Respondent's products, in direct contravention of the Complainant's right to object to processing.

On the question of the Respondent's liability, the ODPC applied Section 72(3) of the Act, which provides that liability for unlawful access to or disclosure of personal data does not extend to an employee or agent acting within the scope of their mandate.

The Office concluded that the two agents, having valid Independent Sales Agent Agreements and Data Processing Agreements that governed their conduct, had acted outside the scope of those agreements when they processed the Complainant's data without company instructions. As their actions fell beyond the confines established by the Respondent, liability for the unlawful processing attached to the agents personally and not to Premier Credit.

The ODPC further noted that the Respondent had acted responsibly upon learning of the complaint by initiating disciplinary proceedings and terminating the agents' agreements. On the question of remedies, the Office found that in the event the Complainant receives further unsolicited marketing messages from the said agents, a fresh complaint ought to be filed directly against those individuals.

Final Determination

The Data Commissioner dismissed the complaint against Premier Credit Limited. Parties were advised of their right to appeal the determination to the High Court of Kenya within thirty (30) days.

Conclusion

This determination offers important guidance on the allocation of liability between data controllers and their independent agents.

Where agents are bound by clear contractual frameworks, including data processing agreements and training acknowledgements, but act outside the scope of those frameworks, the liability for resulting data protection violations will rest with the agents personally rather than with the data controller.

However, organisations should take note that the absence of direct liability does not insulate them from the reputational and regulatory consequences of their agents' conduct. Proper contractual frameworks, regular training, and prompt disciplinary action upon discovering breaches remain essential safeguards.

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The case further underscores the importance of the right to object under the Data Protection Act, 2019. Once a data subject clearly withdraws consent or objects to marketing communications, any continued processing even by an agent constitutes a violation.

Organisations must implement effective mechanisms to ensure that opt-out requests are honoured promptly and consistently across all channels, including those managed by third-party agents.

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- Advisory on direct marketing, consent frameworks, and digital platforms
- Regulatory defence before the ODPC
- Cybersecurity governance and incident response advisory
- Cross-border data transfer and privacy risk management

For Further Guidance

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