

A large, stylized red graphic consisting of two overlapping, irregular shapes that resemble a banner or a stylized letter 'A'. The text 'ARTICLE 19' is written in white, bold, sans-serif capital letters across the center of the graphic.

ARTICLE 19

ARTICLE 19 Eastern Africa

Memorandum

Public Consultation on the Draft Office of the Data Protection Commissioner Strategic Plan FY 2021-2023

**To: The Office of the Data Protection Commissioner
Kenya**



ARTICLE 19 EA response to the Office of the Data Protection Commissioner Draft Strategic Plan FY 2021-2023

Introduction

ARTICLE 19 Eastern Africa welcomes the efforts of the Office of the Data Protection Commissioner to engage in a multi-stakeholder process by holding this Public Comment Consultation on the proposed Strategy FY 2021-2023.¹

This consultation is an important opportunity, as the strategy provides direction on how to realise the objects of the Data Protection Act 2019. It identifies key result areas namely; Institutional Capacity development, Regulatory services and awareness creation as well as the implementation framework to achieve these objectives. We thus appreciate the opportunity to provide the office with our position and look forward to the discussion that will follow.

Summary and Recommendations

From our analysis, we acknowledge and welcome the positive recommendations of the strategy particularly in identifying the key result areas over the next three year period. In particular, we welcome the aim to streamline data protection with Kenya's Big 4 Development Agenda and those set out in the Third Medium Term Plan (2018-2022). This includes ensuring protection of sensitive health data under the Universal Health Care project, encouraging open data policy to promote healthy market competition and promoting the protection of personal data under Housing projects.

We are however concerned that the strategy fails to address key areas such as the complementary nature of data protection with other information rights, and it does not provide a framework to ensure the Act is implemented in harmony with existing legislation. Secondly, the strategy fails to prioritise and address the needs of marginalized and vulnerable communities when it comes to creating awareness on data protection. Third, the strategy fails to address how to implement the provisions on exemption from compliance with the data protection principles as envisaged under the Act which are necessary for development of Journalism, literature art, history and research purposes.

We therefore recommend the Office of the Data Protection Commission to:

1. Issue a guidance note harmonising the Data Protection Act 2019 with the Access to information Act 2016 to ensure the rights of the data subject under Section 26 of the Data Protection Act are realised.
2. Expand the scope of self regulation beyond organisational level to an industrial sector to foster a culture of compliance with the Data Protection Act 2019.

¹ ODPC, Strategic Plan FY 2021-2023 (October, 2021)

https://www.odpc.go.ke/wp-content/uploads/2021/10/ODPC-Draft-Strategic-Plan_v2.5-20211021.pdf accessed 01 November 2021



3. Include adoption of regional and international frameworks namely the African Union Convention on Cyber Security and Personal Data Protection and Convention 108+ as a strategy to achieve this focus area and be used as an indicator in the monitoring and evaluation framework. Further, we urge the ODPC to comply with the principle of public participation as envisaged under Article 10 of the Constitution of Kenya 2010 and the Treaty Making and Ratification Act 2012.
4. Endorse the African Declaration on Internet Rights and Freedoms that is built on existing African Frameworks. Principle 8 of the Declaration states that everyone has a right to privacy online including to use available technology to communicate anonymously and protection of their personal data.
5. Prioritise and develop codes of practice on General exemptions, Journalistic exemption and exemptions based on Research, History and Statistics, providing practical guidelines on the exemption from compliance with the Data Protection Act and principles respectively.
6. Promote interagency cooperation by developing the data sharing code to guide lawful exchange of personal data between government departments or public sector agencies subject to the Santa Clara and 13 Necessary and Proportionate principles.
7. Develop an inclusivity strategy that promotes awareness of data protection among vulnerable groups such as Persons with disabilities as required under Article 10, 21(3), 27, 31, 54,56 and 57 of the Constitution of Kenya 2010.



MATRIX REPRESENTATION
THE DRAFT OFFICE OF THE DATA PROTECTION COMMISSION STRATEGIC PLAN FY 2021-2023

Section	Provision	Proposal	Justification
Key Result Area 2: Regulatory services	Focus Area: Regulation	We recommend the office to issue a guidance note harmonising the Data Protection Act with the Access to information Act 2016 to ensure the rights of the data subject under Section 26 of the Data Protection Act are realized.	<p>Although different authorities particularly the Office of the Data Protection Commission and the Commission of Administrative Justice are responsible for data protection and access to information respectively, ARTICLE 19 EA notes the following overlaps:</p> <p><i>Transparency: complying with access to information requests</i></p> <p>Regulation 8 of The Draft Data Protection (General) Regulations released by the ODPC fails to provide for a definite period for which data controllers and processors need to comply with data access requests from a data subject. The Access to Information Act provides that Public officers must comply with access requests within 21 days. There is a need to provide for the time for compliance with data access requests. Similarly, owing to overlapping jurisdiction on access to information, there is need to determine the proper authority to lodge a complaint to if a data processor or controller fails to comply with a data access request. In the UK, the Information Commissioner's Office noted the complementary nature of these rights and issued a guidance note to elaborate on the right to information² and the right to access data³ as it relates to data protection. The Data Protection Act exists in tandem with other legislation particularly the Constitution and the Access to information Act 2016 which guarantee the right to access information. We emphasise that</p>

² Information Commissioner's Office, 'Right to be informed'

<<https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/individual-rights/right-to-be-informed/>> accessed 1 November 2021

³ Information Commissioner's Office, 'What is the right of access?'

<<https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/right-of-access/what-is-the-right-of-access/>> accessed 1 November 2021

Section 26 of the Data Protection Act grants the data subject the right to access their personal data in custody of the data controller and data processor and the right to be informed of the use of to which their personal data is being put.

Publishing of information as open data

The ODPC aims to promote an open data policy to promote healthy market competition. ARTICLE 19 appreciates the need to encourage maximum proactive disclosure by public bodies through use of accessible format and anonymised data sets (open data) while balancing against the right to privacy and data protection. In tandem, we have published the Global principles on protection of Free expression and Privacy⁴, that explains how to reconcile the right to information, data protection and privacy with regards to open data. Kenya joined the Open Government partnership in 2011 and released the Fourth National Action plan which contains promising commitments on Access to Information. Some Counties have already published access to information legislation and there is a need to harmonise this with upcoming data protection frameworks.

Recommendations:

We encourage the ODPC to issue a guidance note that addresses overlaps of the Data Protection Act with existing statutes, especially the Access to Information Act as a key strategy to achieving regulatory services. This will also provide guidance to the judiciary in the interpretation of statute.

⁴ ARTICLE 19, 'The Global Principles on Protection of the Right to Free Expression and Privacy'
< <https://www.article19.org/data/files/medialibrary/38657/Expression-and-Privacy-Principles-1.pdf>> accessed 1 November 2021

Key Result Area; Regulatory Services	Focus Area; Regulation 'Promoting self regulation through inspections and certification	We recommend expanding the scope of self regulation beyond organisational level to an industrial sector to foster a culture of compliance with the Data Protection Act 2019	Self regulation at an industrial or sector level helps to ensure appropriate checks and balances cumulatively to protect the data subject. Recently, the digital lenders in Kenya published a code to guide listing on Credit Reference Bureaus which promotes data protection within the industry. Likewise, sectors such as the Media and Journalism ought to be encouraged to develop sector specific codes and overall self regulation in the processing of data that takes into consideration specific sector needs. Section 52 of the Data Protection Act allows publication of works of Journalism, art or literature to be exempted from complying with the principles of data protection under section 25 as long as such publication conforms with a self regulatory or issued code of practice.
Key Result Area: Regulatory services	Focus Area; Compliance	We recommend that adoption of regional and international frameworks namely the African Union Convention on Cyber Security and Personal Data Protection and Convention 108+ be included as a strategy to achieve this focus area and be used as an indicator in the monitoring and evaluation framework.	Kenya is yet to ratify key regional and international frameworks on data protection such as the African Union Convention on Cyber Security and Personal Data Protection and Convention 108+ which both offer model standards for data protection across the continent and the world. Infact, Regulation 40 of the Draft Data Protection (General) Regulations 2021 ⁵ considers a country that has ratified this convention as having adequate data protection safeguards. In addition, we encourage the ODPC to comply with the principle of public participation as envisaged under Article 10 of the Constitution of Kenya 2010 and the Treaty Making and Ratification Act 2012. Further, we urge the ODPC to endorse the African Declaration on Internet Rights and Freedoms that is built on existing African Frameworks. Principle 8 of the Declaration states that everyone has a right to privacy online including to use available technology to communicate anonymously and protection of their personal data.

⁵The Office of the Data Protection Commissioner, 'The Data Protection (General) Regulations, 2021' < <https://www.odpc.go.ke/wp-content/uploads/2021/04/Data-Protection-General-regulations.pdf>> accessed 1 November 2021



<p>Key Result Area 2: Regulatory Services</p>	<p>Focus Area: Compliance</p>	<p>We recommend the ODPC to prioritise and develop codes of practice on General exemptions, Journalistic exemption and exemptions based on Research, History and Statistics, providing practical guidelines on the exemption from compliance with the Data Protection Act and principles respectively</p>	<p>Part VII of the Data Protection Act highlights certain areas where processing of personal data is exempt from compliance with the principles of data protection, including where processing is necessary for public interest or national security, or where processing is undertaken for literary or artistic material or for research, history or statistical purposes.</p> <p>The Act requires the ODPC to issue codes of practice with practical guidelines on the exemptions. In our earlier submission⁶, ARTICLE 19 EA highlighted that Regulation 46 of the Draft Data protection (General) regulations is erroneous as it fails to define specific circumstances where national security may constitute a ground for exemption. Similarly, we highlight specific challenges to the journalistic exemption that necessitate substantive amendments to the Data Protection Act to ensure a balance between free expression and data privacy. In particular, the Act only provides that processing of data for journalistic, literature and art are only exempt from compliance with the data protection principles and not the substantive provisions of the Act itself. This means that journalists must comply with restrictions on cross border flows, disclosures that may potentially expose confidential information such as journalistic sources or limit the free flow of information.</p> <p>We note the need for clarity on exemption is necessary to ensure data processors and data controllers are aware of their responsibility and also serve to improve judicial interpretation of the Data Protection Act.</p>
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⁶ ARTICLE 19 EA, 'Memorandum Public Consultation on the Draft Data Protection Regulations, 2021' (ARTICLE 19, 11 May 2021)

<<https://www.article19.org/wp-content/uploads/2021/07/ARTICLE-19-Eastern-Africa-Memorandum-Draft-Data-Protection-Regulations-11.05.2021.pdf>> accessed 1 November 2021



			The guidance note should also be expressly included as an output indicator in the Monitoring and Evaluation framework under table 6.2.2
Key Result Areas; Regulatory Services	Focus Area; Compliance	We recommend the ODPC promote interagency cooperation by developing the data sharing code to guide lawful exchange of personal data between government departments or Public sector agencies subject to the Santa Clara and 13 Necessary and Proportionate principles ⁷ .	<p>Section 55 of The Data Protection Act requires the ODPC to develop a data sharing code with guidelines on the sharing of personal data among government agencies and public sector bodies.</p> <p>We recognize the development of this code is essential to promote good practice among public entities. We also recognise the use of this tool as a monitoring and evaluation tool where public agencies can be evaluated against their compliance with the code.</p> <p>However, the strategy outlines that data protection will be implemented in conformity with Kenya's Development plan. The Third Medium Term Plan (2018-2022) plans to increase government acquisition of surveillance technology as part of its development strategy. It is therefore imperative that the ODPC ensures surveillance is balanced against the right to privacy by ensuring conformity to the 13 Necessary and Proportionate Principles on the application of Human Rights to Communications Surveillance.</p>
Key Result Areas; Awareness Creation	Focus; Communication	We recommend the ODPC develop an inclusivity strategy that promotes awareness of data protection among vulnerable groups such as Persons with disabilities as required under Article 10, 21(3), 27, 31, 54,56 and 57 of the Constitution of	<p>The strategy correctly highlights that in order to build a culture of data protection in Kenya, all stakeholders namely the data subject, controllers and processors must be aware of their responsibilities and rights.</p> <p>While we appreciate that the Authority is prioritising awareness creation, we note that key strategies fail to consider the disparity of marginalized and vulnerable populations. For example persons living with disabilities</p>

⁷ Necessary and Proportionate Principles, International Principles on the Application of Human Rights to Communications Surveillance (May 2014) <<https://en.necessaryandproportionate.org/>> accessed 1 November 2021



Kenya 2010.

who take up different roles in the ecosystem, either as data subjects or controllers and processors. In the data ecosystem, given the socio-political environment in the country, this may extend to directions on the processing of data concerning sexual orientation.

There is a need to identify key vulnerable and marginalized populations, key stakeholders and design strategies to address their specific needs. These strategies should also be adequately measured under the Monitoring and Evaluation Framework.



Conclusion

ARTICLE 19EA is grateful for the opportunity to engage with the Office of the Data Protection Commission of Kenya in this public consultation process.

We look forward to continued collaboration and welcome further engagement opportunities and avail ourselves in case of any questions or concerns.

If you would like to discuss this analysis further, please contact Catherine Muya, Eastern Africa's Digital Programme Officer, at catherinemuya@article19.org Additionally, if you have a matter you would like to bring to the attention of the ARTICLE 19 Eastern Africa Office, you can contact us by email at kenya@article19.org with Mugambi Kiai (mugambikiai@article19.org) in copy - or call +254 727 862 230

About ARTICLE 19

ARTICLE 19 is an international human rights organisation that works to protect and promote free expression, which includes the right to speak, freedom of the press, and the right to access information. With regional programmes in Africa, Asia, Europe, Latin America, and the Middle East and North Africa, we champion freedom of expression at the national, regional, and international levels.

The work of ARTICLE 19 Eastern Africa focuses on work across the region in partnership with other national and regional organisations and mechanisms to safeguard freedom of expression and information, and to create solidarity networks aimed at achieving this goal. We engage with regional bodies including the African Commission on Human and Peoples' Rights, the African Court, the African Union and the East African Community.

Over the past 14 years, within Eastern Africa, we have built a wealth of experience defending and promoting digital rights at the local, regional, and international levels. ARTICLE 19's Digital Programme focuses on the nexus of human rights, Internet infrastructure, and Internet governance. We have contributed to several Internet Freedom Policies, Data Protection, Cybercrime Bills and TV White Space Frameworks including Kenya's Draft Dynamic Spectrum Access Framework for Authorisation of the Use of TV White Spaces (2020), Kenya's Huduma Bill (2019), Kenya's Data Protection Bill(s) (2018/2019), Kenya's Cybercrime and Computer Related Crimes Bill 2014; Uganda's Data Protection and Privacy Act (2019), Uganda's Draft TV White Space Guidelines (2018); Tanzania's Cybercrime Act, 2015, among many others. We were also part of the Inter-Agency Technical Committee of the Ministry of ICT that developed the Kenya Cybercrime Bill, 2016 and the Kenya Data Protection Bill, 2018.