

COMMENTARY | WHAT AMOUNTS TO A VALID CONSENT? THE ODPC GUIDANCE NOTE ON CONSENT

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In the wake of the online controversies on consent notices by different entertainment joints across the country, the Office of the Data Protection Commissioner (“ODPC”) swiftly came in to address the dire situation. Following the fines imposed on a popular nightclub in Nairobi, many entertainment joints took to social media to try and cover their bases by posting disclaimers allowing them to photograph individuals within their premises. These notices directed that by entering the clubs, one consents to being taken videos and photos and such images or videos can be used in the joints’ online marketing. These notices triggered heated online debates and the key question was what really amounts to a valid consent? Well, the ODPC published a guidance note on consent (the **Guidance Note**) which are meant to guide data processors and data controllers on obtaining valid consents from data subjects.

First things first, the Data Protection Act, 2019 (“**the Act**”) defines consent as a **free, unequivocal, specific** and indication of the data subject’s wishes by a statement or by a **clear affirmative action** signifying agreement to the processing of personal data relating to the data subject. Clearly, consent is an essential element which should be considered by data controllers and data processors before processing personal data belonging to data subjects. As such, consent is valid if the data subject is offered an opportunity to choose whether to accept or decline the terms of the consent without any prejudice whatsoever. However, this go-ahead by a data subject should not be interpreted to give the right to data controllers/processors to process data without due regard to the principles of data minimization, necessity, proportionality and fairness.

Before any processing of personal data belonging to the data subject, the consent must be informed. This means that the data subject must understand why their personal data is needed and the implications of the processing on their rights. Accordingly, the data controllers/processors must disclose full and accurate information on the use of the personal data to be collected and processed. Consent should also be separate and not tied together with other terms and conditions. The request for processing of personal data must be clear, simple and in a language the data subject can comprehend. As such, the data controllers/processors must explain to the data subject what is it they are consenting to. With this clear understanding, the data subject must then voluntarily and without any threats, duress or undue influence agree to processing of their personal data.

The Guidance Note sets out the following key requirements for valid consent:-

The data controller or data processor must identify itself

For purposes of processing personal data belonging to data subjects, the data controller/processor must be clearly identified. Therefore, the request and processing of personal data must be made by an identifiable entity or person.

The data controller or data processor must also name any third party who will be relying on the consent of the data subject in processing their personal data.

Purposes of the processing of personal data

The data controller/processor must clearly and unequivocally indicate to the data subject the reasons for processing the personal data. These reasons must also indicate why the consent of the data subject is being sought before the processing activities of their personal data commenced. At this point, the data subject should be made aware of why their data is being processed and where necessary collected.

Type of personal data being processed

The data controllers/processors must notify the data subject the personal data type is being processed. For the purposes of processing data, personal data means any information relating to an identified natural person or identifiable natural person including images, name, email address, IP address, telephone number, ID, postal address, bank accounts, KRA pins among others.

Type of processing activities

The data controllers/processors must clearly indicate all the processing activities to which the personal data belonging to data subjects will be used. Some of the examples of such activities include; marketing purposes, promotional activities, staff management, payroll administration, advertising, email marketing, analytics, user credentials among others.

Right to withdraw consent at any time

The data subject has a right to withdraw consent for processing of their personal data at any time. This withdrawal entitles the data controller/processor to immediately stop the processing of personal data belonging to the data subject. The withdrawal of consent means that the personal data belonging to the data subject should be permanently deleted, erased or restricted access. However, a data controller/processor may decline a request for restriction or erasure and the controller/processor for reasons such as the controller/processor needs to retain the information to comply with a legal obligation, for public interest or to exercise/defend a legal claim.

Conclusion

Consent is everything and without it, a data controller or data processor cannot take one more step towards the direction of processing data subject's personal data without their express consent. In such a situation, a data controller or data processor is obliged to down their tools and seek the consent of a data subject first.

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