



Republic of the Philippines
NATIONAL PRIVACY COMMISSION

ODC,

Complainant,

NPC Case No. 17-001

-versus-

*For: Violation of Data
Privacy Act of 2012*

ODB & AE,

Respondents.

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RESOLUTION

LIBORO, P.C.

For this Commission's resolution is the Motion for Reconsideration dated 20 December 2017 assailing the Commission's Decision dated 04 December 2017.

The facts are the following:

On 3 February 2017, Complainant filed a formal complaint before this Commission alleging that Respondent ODB, without consent, deducted from his ODB Savings Account his unpaid balance in his AE Credit Card. According to Complainant, his personal data was processed without his consent, thus, a clear violation of the Data Privacy Act of 2012 (DPA).

On 10 April 2017, Respondent ODB filed a Comment¹ stating therein that the complaint should be dismissed due to several grounds. According to Respondent ODB, Complainant committed forum shopping as a prior complaint before the Bangko Sentral ng Pilipinas (BSP) has been lodged. Further, the complaint does not involve any

¹ Records, p. 19.

violation of the DPA as no data sharing to a third party took place considering that Respondent ODB is the issuer of Complainant's AE card. Respondent ODB likewise argued that Complainant was legally and contractually bound to pay his credit card bill.

This Commission, in its 04 December 2017 decision², ruled that there was no forum shopping in this case as the right asserted by Complainant in his complaint before this Commission is for violation of the DPA while the one in BSP is for violation of the Bank Secrecy Act. This Commission likewise ruled that although Respondent ODB did not commit unauthorized processing of personal information as this was done with Complainant's consent, it was sternly warned as it violated the Principle of Transparency required by law.

In ruling that Respondent ODB violated the principle of transparency, this Commission stressed that the principle of transparency requires personal information controllers (PIC) to ensure that the data subject must always be able to understand how and why his or her personal information is being processed. For this Commission, Respondent ODB did not properly inform Complainant of its ability and intention to set off its legal claim. While this information can be found within the terms and conditions of the credit card agreement signed by complainant, the way the latter's data was to be processed remained opaque and buried in legalese.

This prompted Respondent ODB to file a motion for partial reconsideration with a prayer that a new decision be rendered reversing the ruling that it violated the principle of transparency and its corresponding penalty. Respondent ODB argued that (1) the Civil Code allows for legal set-off or compensation for as long as the elements under Article 1278 and 1279 are complied with and that the law does not require notification before set-off; (2) the logic behind Article 1290 of the Civil Code as to the non-requirement of notice in case of legal compensation is due to the fact that a party may remove the money against which the set-off would be applied once notice is served; and (3) the ruling that it violated the principle of transparency under the DPA run counter to the provisions of the Civil Code on legal

² Decision dated December 4, 2017 at p.9; Penned by Privacy Commissioner Raymund E. Liboro with Deputy Privacy Commissioner Ivy Patdu concurring.

compensation which is provided for in the Civil Code and not under the DPA.

We find no merit in the arguments.

While this Commission appreciates Respondent ODB's lengthy discussion on the provisions of the Civil Code on legal set-off or compensation, the same is irrelevant as this was not questioned by the Commission nor did this Commission adjudge Respondent ODB to have violated the Civil Code.

In its 04 December 2017³ Decision, this Commission in fact acknowledged the relationship between a bank and its depositor- that the bank and the data subject are debtors and creditors of each other, and that a bank has the right to set-off the deposits in its hands for payment of a depositor's indebtedness. In other words, the Commission recognized ODB's right to set-off the debt of Complainant from the latter's savings account.

This Commission is likewise well-aware that the Civil Code imposes no obligation on the part of the bank to notify their client prior to the actual legal compensation or set-off. When this Commission ruled that Respondent ODB should have properly informed Complainant of its ability and intention to set off its legal claim, this Commission did not mean Respondent ODB should have notified Complainant prior the actual set-off. Rather, it meant that the credit card terms and conditions of Respondent ODB should have complied with the principle of transparency.

Under Chapter III, Section 11 of the Data Privacy Act of 2012, the processing of personal information shall be allowed, subject to compliance with the requirements of said act and other laws allowing disclosure of information to the public and adherence to the principles of transparency, legitimate purpose and proportionality⁴.

³*Id.*, at p. 9.

⁴ An Act Protecting Individual Personal Information in Information and Communications Systems in the Government and the Private Sector (Data Privacy Act of 2012) Chapter III Section 11.

Any processing of personal data should be lawful and fair. It should be transparent to natural persons that personal data concerning them are collected, used, consulted, or otherwise processed and as to the extent their personal data are or will be processed. The principle of transparency requires that any information and communication relating to the processing of those personal data be easily accessible and easy to understand, and that clear and plain language be used. Further, the principle of transparency concerns, in particular, information to the data subjects on the identity of the controller and the purposes of the processing and further information to ensure fair and transparent processing in respect of the natural persons concerned and their right to obtain confirmation and communication of personal data concerning them which are being processed. It is imperative that natural persons should be made aware of risks, rules, safeguards and rights in relation to the processing of personal data and how to exercise their rights in relation to such processing.⁵

This simply means that companies must state in clear and plain language how they will handle data, for what purpose and by whom. For example, if a company holds data related to children, then the reading level of the content must be accessible for those children⁶. In the same sense that if a company handles data related to a common person then the reading level should be understood by a common person.

Thus, it is imperative that every personal information controller must remember that transparency is a core principle of the DPA. Adherence to this principle is key to “fairness” which is an equally important criterion set for lawful processing of personal data under the DPA.

It is critical in establishing trust and confidence by a business to a customer and should evoke a sense of fairness and a response that encourages more meaningful participation by data subjects. Transparency is necessary to prove organizational accountability to data subjects. Thus, it is not only a legal tool but an instrument for any business to be trusted in today’s personal data driven society.

⁵ Recital 39 of the European General Data Protection Regulation (GDPR) available at <http://www.privacy-regulation.eu/en/recital-39-GDPR.htm>

⁶ Fergal McGovern, The GDPR and Plain Language: What you need to do to comply, available at <https://www.cmswire.com/digital-experience/the-gdpr-and-plain-language-what-you-need-to-do-to-comply/>, October 18, 2017.

The Data Privacy Act of 2012, which is based on globally adopted privacy principles, introduces a much broader definition for transparency in that it must not only satisfy a legal mandate but more importantly, address the expectations of data subjects. The transparency principle as contemplated in the DPA and as differentiated from what the legal profession have become accustomed to, is centered on the reasonable expectations of the user to be informed and must go beyond legal compliance. Privacy Notices and Terms and Conditions (T & C's for brevity) are prime examples where a company can show its transparency to customers. These are essential for legal purposes and a demonstrable proof of organizational accountability to the DPA. However, the presence of Privacy Notices and T & C's alone, does not automatically translate to being transparent. They could be meaningless to data subjects if they are not concise and easy to understand and do not effectively explain the benefits, risks, potential harm, and even pain of data use and the choices and options available to them.

Businesses and their lawyers must realize that personal data processing is now set against a milieu that enunciates the rights to privacy and data protection. They must recognize that legal transparency is different from user-centric transparency. The former may be understandable to legal professionals and appreciated by the legal community while the latter should be understandable to the data subject and satisfy their desire to understand how their personal information will be used. The former addresses their broad legal mandate. The latter fulfills compliance to the DPA. The former uses legalese. The latter uses clear and plain language that is easy to understand. Clearly, they must comprehend that the rules in the processing of personal data have changed.

Admittedly, there is transparency tension whenever legalese cross paths with user expectation. This tension often appears in situations where a power imbalance is present. Power imbalance in data privacy parlance is a condition where meaningful information for the data subject becomes more difficult to obtain especially when the controller, like a bank, hold considerable power over a depositor or customer because they are offering financial services that is vital to the needs of an individual. This situation presents itself in other contexts such as in the health sector where a hospital or a health professional wields considerable power over a patient and even in schools where

administrators and teachers exercise a significant degree of control over students.

Incidentally, these industries and sectors have been identified by the Commission to belong to a set of personal information controllers and processor that practice larger-scale and a higher-risk type of processing compared to other PICs and PIPs. They are all contained in Appendix 1 of NPC Circular 17-01 on the Registration of Data Processing Systems and Notification Regarding Automated Decision - Making⁷. A bank and a credit card-issuer like Respondent ODB belongs to one of these sectors. Since it practices a higher-risk type of processing that could lead to situations where a data subject may experience risks or threats or exposed to harm or even pain, it is expected that the data subject should be provided with clear, concise, intelligible, and easy to understand information to guide and provide them with a clear picture and a genuine choice about the use of their personal data.

The NPC is aware of these contexts and seeks to reduce this tension. This is the reason why in these imbalanced conditions, the NPC takes a harder look on how controllers adhere to the principles of personal data processing, namely: transparency, legitimate purpose and proportionality. This Commission stands firm that the onus in resolving this transparency tension between legal mandates and user expectation lies with the business or the personal information controller and its processors. By treating data privacy accountability to their customers more seriously and having the data subject's interest in mind, this tension can be reduced and potential transparency violations to the DPA prevented.

Further, this Commission will never tire in calling out personal information controllers to adhere to the data privacy principles. The Commission understands that it takes effort, creativity and innovation to cure this imbalance and strike that equality between clarity and the data subject desire to understand. It is also conscious not to prescribe disproportionate measures that may be too difficult for the controller to implement. We find amending contracts, privacy notices, and terms and conditions elementary practices that should not take

⁷ National Privacy Circular 17-01 Registration of Data Processing and Notifications regarding Automated Decision Making (NPC Circular 17-01- registration) 31 July 2017 available at <https://www.privacy.gov.ph/npc-circular-17-01-registration-data-processing-notifications-regarding-automated-decision-making/>

disproportionate efforts to implement. We note that Respondent ODB took the first step in this direction by amending its Terms and Conditions in this case. We note further the effort of Respondent ODB to resolve and mitigate this imbalance by delivering a better crafted provision in the T & C on the consequences of default by a card holder in pursuit of their legitimate interest to process personal data. It was a manifestation that they completely agree with our determination of the shortcomings of their original Terms and Conditions in providing the clarity sought by the complainant.

In this case, while the terms and conditions of AE Credit Card was signed by Complainant, the way the latter's data was to be processed for purposes of legal compensation or set off remained opaque and buried in legalese. The terms and conditions did little to provide Complainant transparency regarding the use of his data.

The Civil Code provides for the elements in order for a legal compensation to take place, however, nothing stops Respondent ODB or any personal information controller from setting out its terms and conditions in a clear, plain, and concise language. This is in fact what Respondent ODB did when it made some changes in its terms and conditions governing the issuance and use of the AE Credit Cards. In the version signed by Complainant, Paragraph 19 (b) of the Terms and Conditions for issuance and use of the AE credit card states:

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b.) All monies, securities, and things of value that are now or hereafter be in the hands of the ISSUER or any of its related companies or both, on deposit or otherwise to the credit of or belonging to the CARDMEMBER, shall be deemed assigned to the ISSUER effective upon the occurrence of default. The ISSUER is also authorized, without need of notice to the CARDMEMBER to automatically debit his/her deposit account for such amounts may be sufficient to cover full payment of the outstanding balance, or to sell at public or private sale such securities or things of value owned by CARDMEMBER and then to apply the proceeds of such sale to any outstanding obligation of CARDMEMBER;

c.) Any Funds of the CARDMEMBER that may now or later be in the hands of the ISSUER or any of its Related Companies will be

applied and set off against any amounts due and payable on the CARDMEMBER's CARD account.

CARDMEMBER hereby gives ISSUER and its Related Companies full power and authority to implement the foregoing acts⁸.

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On the other hand, Respondent ODB's new terms and conditions as provided for the use of AE credit card pertaining to consequences of default states:

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ISSUER may, and is hereby authorized by the CARDMEMBER to set off as full or partial payment, and/or withhold, to the extent permitted by law, at ISSUER's option and without need of prior notice, all monies, funds, and/or proceeds of securities, investments or receivables which may come into the possession or control of the ISSUER and/or its Related Companies, to apply the same in satisfying any or all obligations of the CARDMEMBER to the ISSUER, whether left with them for safekeeping or otherwise, or coming into any of their hands in any way, to settle any and all obligations of the CARDMEMBER to the ISSUER. CARDMEMBER irrevocably authorizes ISSUER and/or its Related Companies to debit such amounts as may be necessary to implement this provision from any of the CARDMEMBER's accounts with the ISSUER and/or its Related Companies, immediately after which due notice shall be sent to the CARDMEMBER. In addition, all such properties, receivables or securities in the possession or control of the ISSUER and/or its Related Companies are hereby ceded, transferred and conveyed by way of assignment unto ISSUER in order that the same may be used to satisfy any and all obligations of the CARDMEMBER to the ISSUER in accordance with this provision. For such purpose, and to effectively carry out the powers herein granted, CARDMEMBER hereby unconditionally or irrevocably names and constitutes ISSUER and/or its Related Companies to be his/her true and lawful attorney-in-fact, with full power of substitution, to do or cause to be done any and all acts that are necessary to carry out the purposes of this paragraph, including the power to sell in accordance with law, based on zonal value or fair market value for real or personal properties, respectively,

⁸ Terms and Conditions for issuance and use of the AE Credit Cards available at <https://www.odb.com.ph/sites/default/files/pdf/AE-TCS.pdf> / October 2013

without the need for any further notice, demand or deed, and to apply the proceeds of the sale to the satisfaction of the CARDMEMBER's obligations to the ISSUER. The appointment of ISSUER and/or its Related Companies is coupled with interest and is, therefore, irrevocable until any and all obligations to the ISSUER are fully settled. For the foregoing purposes, the CARDMEMBER hereby waives his/her rights in favor of the ISSUER and/or its Related Companies under Republic Act 1405 (The Bank Secrecy Act of 1955), as amended, Section 55 of Republic Act 8791 (The General Banking Law of 2000), as amended, Republic Act 6426 (Foreign Currency Deposit Act of the Philippines of 1974), as amended, Republic Act 10173 (Data Privacy Act of 2012) and other laws/regulations, including all subsequent amendments or supplements thereto, relative to the confidentiality or secrecy of bank deposits/accounts, placements, investments and similar or related assets in the custody of the ISSUER and/or its Related Companies. CARDMEMBER shall hold ISSUER and/or its Related Companies, their directors, officers, employees, representatives and agents, free and harmless from any liability arising from ISSUER's, and/or its Related Companies' exercise of their remedies and authorities hereunder, or from any action taken by ISSUER and/or its Related Companies on the basis of and within the framework of the foregoing appointment⁹.

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The very fact that Respondent ODB made changes in its terms and conditions is at the very least an acknowledgment of the lack of full transparency in the terms and conditions signed by Complainant. The dispositive portion of the 04 December 2017 decision states that Respondent ODB should SUBMIT their privacy notices and consent form that adequately informs the data subject of his rights within fifteen (15) days from receipt of the Decision. This Commission did not ORDER Respondent ODB to change its privacy notices and consent form. The Commission merely asked Respondent ODB to SUBMIT privacy notices and consent form that adequately informs that data subject of his rights. Thus, if Respondent ODB truly believed that it did not violate the principle of transparency as set forth in its motion for partial reconsideration, it could have simply submitted the terms and conditions signed by Complainant.

⁹ Terms and Conditions for issuance and use of the AE Credit Cards available at <https://www.odb.com.ph/sites/default/files/pdf/AE-TCS.pdf> / March 2019

Nevertheless, this Commission finds this an appropriate response by Respondent-ODB to make its Terms and Conditions more understandable to the subject and we expect the business to benefit from this action. This simple step that could be complemented by other accountability measures to be taken by Respondent-ODB, could help mitigate potential tension between them as data controller and the data subjects like the complainant, in the future. This was a response that proves better allocation of time, effort and resources by Respondent-ODB to address age-old transparency matters with fairness to the data subject in mind.

Therefore, this Commission stands by its decision that Respondent ODB violated the principle of transparency. To reverse the same would be to frustrate the operationalizing of the Data Privacy Act of 2012. With the passage of this important law, personal information controllers should put themselves in the shoes of its stakeholders, clients, or customers to ensure that the language used in privacy notices, consent forms, or terms and conditions is at the latter's level. Personal information controllers must be mindful of their clientele and should no longer rely on privacy policies or terms and conditions written in legalese.

This Commission believes that conforming to the principle of transparency will both benefit Respondent ODB's clients and its business.

WHEREFORE, for all the foregoing, Respondent ODB's **MOTION FOR RECONSIDERATION** is hereby **DENIED**.

SO ORDERED.

Pasay City, Philippines.
9 August 2019

(Sgd.)

RAYMUND ENRIQUEZ LIBORO
Privacy Commissioner

CONCUR:

(Sgd.)

IVY D. PATDU
Deputy Commissioner

DISSENTING OPINION

AGUIRRE, *D.P.C.*

This case raises for the Commission's consideration the issue of whether respondent ODB violated the principle of transparency under RA 10173 or the Data Privacy Act of 2012 ("DPA")¹⁰ by not informing complainant ODC when it opted to exercise its right to debit from his ODB Savings Account the outstanding balance from his AE Credit Card.

In its 04 December 2017 Decision ("Decision"),¹¹ the Commission held that ODB violated the principle of transparency, thus:

The respondent should have properly informed the complainant of its ability and intention to set off its legal claim. Even though the information required can be found within the terms and conditions of the credit card agreement signed by the complainant, the way the complainant's data was to be processed remained opaque and buried in legalese. What is wanting from the Respondent is the transparency expected from banks when dealing with the public.¹²

Not satisfied with the Decision, respondent ODB filed their Motion for Partial Reconsideration praying that this Commission reverse its finding that it violated the principle of transparency. As summarized by the majority in their Resolution:

[R]espondent ODB argued that (1) the Civil Code allows for legal set-off or compensation for as long as the elements under Article 1278 and 1279 are

¹⁰ "An Act Protecting Individual Personal Information In Information And Communications Systems In The Government And The Private Sector, Creating For This Purpose A National Privacy Commission, And For Other Purposes."

¹¹ ODC v. ODB and AE, NPC Case No. 17-001, 04 December 2017.

¹² *Ibid.*, at p. 9.

complied with and that the law does not require notification before set-off; (2) the logic behind Article 1290 of the Civil Code as to the non-requirement of notice in case of legal compensation is due to the fact that a party may remove the money against which the set-off would be applied once notice is served; and (3) the ruling that it violated the principle of transparency under the DPA run counter to the provisions of the Civil Code on legal compensation which is provided for in the Civil Code and not under the DPA.¹³

In denying ODB's Motion for Partial Reconsideration, the majority dismissed ODB's discussion on the civil law concept of legal set-off or compensation saying that "the same is irrelevant as this was not questioned by the Commission nor did this Commission adjudge respondent ODB to have violated the Civil Code."¹⁴ The majority then went on to qualify its previous ruling despite the clear implication of the text, saying:

When this Commission ruled that Respondent ODB should have properly informed Complainant of its ability and intention to set off its legal claim, this Commission did not mean Respondent ODB should have notified Complainant prior [sic] the actual set-off. Rather, it meant that the credit card terms and conditions of Respondent ODB should have complied with the principle of transparency.¹⁵

Expounding on the general data privacy principle of transparency, the majority further stated:

The transparency principle as contemplated in the DPA and as differentiated from what the legal profession have become accustomed to, is centered on the reasonable expectations of the user to be informed and must go beyond legal compliance. Privacy Notices and Terms and Conditions (T&C's for brevity) are prime examples where a company can show its transparency to customers. These are essential for legal purposes and a demonstrable proof of organizational accountability to the DPA. However, the presence of Privacy Notices and T&C's alone, does not automatically translate to being transparent. They could be meaningless to data subjects if they are not concise and easy to understand and do not effectively explain the benefits, risks, potential harm, and even pain of data use and the choices and options available to them.

Businesses and their lawyers must realize that personal data processing is now set against a milieu that enunciates the rights to privacy and data protection. They must recognize that legal transparency is different from user-centric transparency. The former may be understandable to legal professionals and appreciated by the legal community while the latter should be understandable

¹³ Resolution, NPC Case No. 17-001, pp. 2-3.

¹⁴ *Ibid.*, at p. 3.

¹⁵ *Id.*

to the data subject and satisfy their desire to understand how their personal information will be used. The former addresses their broad legal mandate. The latter fulfills compliance to the DPA. The former uses legalese. The latter uses clear and plain language that is easy to understand. Clearly, they must comprehend that the rules in the processing of personal data have changed.¹⁶

The principle of transparency is indeed, as the majority has put it, “critical in establishing trust and confidence by a business to a customer and should evoke a sense of fairness and a response that encourages more meaningful participation by data subjects.”¹⁷ There is no question about that. As to how the majority interpreted and applied it to this case, however, I respectfully dissent.

In saying that respondent ODB’s discussion on the civil law concept of legal set-off is irrelevant, the majority overlooks the significance of respondent ODB’s arguments. First, it bears stressing that the Commission is not tasked with and has no authority to examine the propriety of the legal set-off and determine whether respondent ODB violated the Civil Code. That is a matter for the regular courts to decide, not the Commission. Second, ODB’s discussion, premised on the clear implication of this Commission’s Decision stating that “respondent should have properly informed the complainant of its **ability and intention to set off** its legal claim,”¹⁸ seeks to show that the matter of the legal set-off is governed by a specific provision of law and, as such, its validity cannot be attacked collaterally using the Data Privacy Act.

In their Motion for Partial Reconsideration, respondent ODB argues:

To allow the data subject/complainant to question the set-off provision, to which he gave his consent, when he accepted his ODB AMEX Card (see Annex “1” hereof), by ruling that ODB violated the principle of transparency under the Data Privacy Act, runs counter to the provisions of the Civil Code on legal compensation / set-off and the elements required to effect said legal compensation / set-off. It must be noted that the matter of set-off / compensation is governed by a different law, i.e. the Civil Code of the Philippines, and not the Data Privacy Act.¹⁹

¹⁶ *Ibid.*, at p. 5.

¹⁷ *Ibid.*, at p. 4.

¹⁸ *Ibid.*, at p. 9. Emphasis supplied.

¹⁹ Motion for Partial Reconsideration dated 19 December 2017, p. 6.

In disregarding the Civil Code provisions on legal set-off and insisting that the DPA is an overarching law the provisions of which supersedes the requirements of other laws governing specific circumstances, the majority is pushing the NPC to play the role of an overbearing regulator. The majority puts the Commission in a position where it acts without any sense of the delicate balance it still has to play in ushering data privacy as a new cog in already functioning mechanisms. Such a position paves the way for creative litigants to weaponize the DPA for purposes not germane to the intent of the law.

The supposed violation of the principle of transparency was neither raised as an issue in the Complaint nor is it supported by substantial evidence.

The Complaint hinges on the following assertions of the complainant:

AE is a credit card company while ODB is in banking. I did not sign any authority for AE to debit my ODB account. Also, the business of AE was only acquired by the ODB group and thus, it is impossible for me to have signed any authority to debit.²⁰

As correctly summarized by respondent ODB:

What the date subject / complainant accused the Bank of is the supposed violation of the Data Privacy Act, in that he was under the mistaken notion that AE and ODB are different entities, and that the sharing of his deposit information is a violation of said law. He only claimed that he did not sign any agreement to debit his account or to auto-debit his account.²¹

In its Decision dated 04 December 2017, the Commission already ruled on the issue of consent stating that the complainant voluntarily gave his consent when he agreed to and signed the terms and conditions.²² On the issue of data sharing, the Commission also held that since ODB and AE are one and the same entity in this jurisdiction, “the information was not shared with any affiliate or subsidiary of ODB

²⁰ Complainant’s email complaint to the National Privacy Commission dated 26 January 2017.

²¹ Motion for Partial Reconsideration dated 19 December 2017, pp. 5 – 6.

²² Decision, NPC Case No. 17-001, 04 December 2017, p. 8.

[and as such] there is no need to further discuss consent of the data subject and the absence of a data sharing agreement..."²³

Since the complainant did not move for the reconsideration of these factual findings of the Commission, these findings are final as to him. Considering also that the Complaint was based on only those two issues, that should have been the end of it. Instead, the majority found respondent ODB to have violated the principle of transparency and gave it a stern warning.

In discussing the substantial evidence requirement for administrative agencies in the exercise of their quasi-judicial powers, the Supreme Court has repeatedly held that "complainants bear the burden of proving the allegations in their complaints by substantial evidence. If they fail to show in a satisfactory manner the facts upon which their claims are based, the respondents are not obliged to prove their exception or defense."²⁴

In this case, the majority found a supposed violation that was not only never alleged by the complainant but, more importantly, not supported by any evidence on record, much less substantial evidence.

Aside from the complainant's bare assertion that he "did not sign any authority for AE to debit my ODB account [and that he] did not enroll said ODB account to any auto-debit facility,"²⁵ there is nothing else on record to support the majority's finding that ODB violated the principle of transparency.

Denial, without more, cannot rise to the level of substantial evidence. This is all the more true in this case since the very thing the complainant is denying has already been decided by the Commission in favor of the respondent.

²³ *Ibid.*, at p. 9.

²⁴ Re: Letter of Lucena Ofendo Reyes Alleging Illicit Activities Of A Certain Atty. Cajayon Involving Cases In The Court Of Appeals, Cagayan De Oro City, A.M. No. 16-12-03-CA, 06 June 2017.

²⁵ ODC Affidavit dated 03 February 2017.

To allow, as the majority does in this case, the mere claim of a data subject of supposedly not knowing of or understanding the effects of the contract they signed to result in a violation of the Data Privacy Act would cause great uncertainty in existing contracts with legitimate ends.

Requirements of the Principle of Transparency

The Resolution of the majority perpetuates the misconception that using legal language violates the principle of transparency

While the Data Privacy Act of 2012 does not define “transparency,” the Implementing Rules and Regulations provide:

- a. Transparency. The data subject must be aware of the nature, purpose, and extent of the processing of his or her personal data, including the risks and safeguards involved, the identity of personal information controller, his or her rights as a data subject, and how these can be exercised. Any information and communication relating to the processing of personal data should be easy to access and understand, using clear and plain language.²⁶

Contrary to the majority’s condemnation of the use of legal language in privacy notices, consent forms, or terms and conditions in its exposition on the difference between legal transparency and user-centric transparency, the requirement to use “clear and plain language” does not prohibit the use of legal language. The principle of transparency does not also require personal information controllers to use layman’s terms to replace technical words and concepts at the risk of not capturing the complex concepts they represent.

In explaining the “clear and plain language” requirement in the European Union’s (“EU”) General Data Protection Regulation (“GDPR”), the independent European working party that dealt with issues relating to the protection of privacy and personal data known as the Article 29 Working Party explained in its Guidelines on Transparency (“Guidelines”):

²⁶ IRR, Sec. 18.

The requirement for clear and plain language means that information should be provided in as simple a manner as possible, avoiding complex sentence and language structures. The information should be concrete and definitive; it should not be phrased in abstract or ambivalent terms or leave room for different interpretations. In particular the purposes of, and legal basis for, processing the personal data should be clear.²⁷

It further added that in structuring sentences, language qualifiers such as “may”, “might”, “some”, “often” and “possible” should be avoided.²⁸

Aside from the “clear and plain language” requirement, another element of the principle of transparency is that the “information and communication relating to the processing of personal data should be easy to access and understand.”²⁹ To help us understand the meaning of “easy to access and understand,” the interpretation of similar language in the GDPR is useful.

Under the GDPR, it is required that the information or communication to be provided to data subjects should be “concise, transparent, intelligible and easily accessible.”³⁰ Although this specific language did not find its way into either the Data Privacy Act or its IRR, it is nevertheless helpful to consider given that the principle of transparency was adopted from the European Commission’s Directive 95/46/EC, the predecessor of the GDPR.

In the Article 29 Working Party’s Guidelines, which has since been endorsed by the European Data Protection Board,³¹ they elaborated on the meaning of each of these additional elements, thus:

²⁷ Guidelines on transparency under Regulation 2016/679 of the Article 29 Working Party, 11 April 2018, *available at* https://ec.europa.eu/newsroom/article29/item-detail.cfm?item_id=622227.

²⁸ *Ibid.*

²⁹ IRR, Sec. 18.

³⁰ Regulation (EU) 2016/679 of the European Parliament and of the Council (General Data Protection Regulation), 27 April 2016.

³¹ European Data Protection Board Endorsement 1/2018, 25 May 2018, *available at* https://edpb.europa.eu/sites/edpb/files/files/news/endorsement_of_wp29_documents_en_0.pdf.

The European Data Protection Board, composed of the data protection authorities of the Member States and the European Data Protection Supervisor, is an independent body with legal personality responsible for ensuring the consistent application of the General Data Protection Regulation.

8. The requirement that the provision of information to, and communication with, data subjects is done in a **'concise and transparent'** manner means that data controllers should present the information/ communication efficiently and succinctly in order to avoid information fatigue. This information should be clearly differentiated from other non-privacy related information such as contractual provisions or general terms of use...

9. The requirement that information is **'intelligible'** means that it should be understood by an average member of the intended audience. Intelligibility is closely linked to the requirement to use clear and plain language. An accountable data controller will have knowledge about the people they collect information about and it can use this knowledge to determine what that audience would likely understand. For example, a controller collecting the personal data of working professionals can assume its audience has a higher level of understanding than a controller that obtains the personal data of children.

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11. The **'easily accessible'** element means that the data subject should not have to seek out the information; it should be immediately apparent to them where and how this information can be accessed, for example by providing it directly to them, by linking them to it, by clearly signposting it or as an answer to a natural language question ...³²

i. What information is required to be disclosed to data subjects?

In our jurisdiction, we generally recognize the relationship between the credit card issuer and the credit card holder as a contractual one that is governed by the terms and conditions found in the card membership agreement.³³ Such terms and conditions constitute the law between the parties.³⁴

To determine the content of the privacy-related information that should be provided to data subjects, we look at the prescribed information covered by the data subject's right to information:

³² Guidelines on Transparency under Regulation 2016/679 of the Article 29 Working Party, 11 April 2018, available at https://ec.europa.eu/newsroom/article29/item-detail.cfm?item_id=622227. Emphasis and underscoring supplied.

³³ Pantaleon v. American Express International, Inc (2010). GR No. 174269.

³⁴ BPI Express Card Corporation v. Armovit (2014). GR No. 163654.

- (1) whether personal information pertaining to him shall be, are being, or have been processed;
- (2) a description of the personal information to be entered into the system;
- (3) scope and method of the personal information processing;
- (4) the recipients or classes of recipient to whom they are or may be disclosed;
- (5) methods utilized for automated access, if the same is allowed by the data subject, and the extent to which such access is authorized;
- (6) the identity and contact details of the personal information controller or its representative;
- (7) the period for which the information will be stored; and
- (8) the existence of their rights, i.e. to access, correction, as well as the right to lodge a complaint before the Commission.³⁵

Following the abovementioned Guidelines on Transparency, the required information should be distinguished, from other non-privacy related information such as contractual provisions or general terms of use.³⁶ Notably, the list of required information under Section 16 of the DPA does not include legal remedies provided under existing laws, such as the right to set-off under the law on obligations and contracts in the Civil Code that is subject of the present case. As such, the subject provision on the “Consequences of Default” is not one of those contemplated by and intended to be covered by the principle of transparency. *Expressio unius est exclusio alterius*.

Given this, the language for provisions that encompass legal concepts should not be overly burdened with unreasonable impositions of simplification on the supposed reliance on the transparency principle.

³⁵ Section 16(b), RA 10173.

³⁶ Guidelines on Transparency under Regulation 2016/679 of the Article 29 Working Party, 11 April 2018, available at https://ec.europa.eu/newsroom/article29/item-detail.cfm?item_id=622227.

- ii. *What is the required manner of disclosing the required information to data subjects?*

Even assuming that it is one of those provisions that is required to be disclosed to data subjects, the other question that needs to be answered is whether the information provided is “intelligible” such that it can be understood by an average member of the intended audience.

At the outset, it should be clarified that compliance with the principle of transparency does not require the personal information controller to determine if the data subject actually understood how their information will be processed. What is required is whether the information provided by the personal information controller, both in terms of the content and manner in which it was provided, would have allowed the data subject to understand if they wanted to.

Elaborating on this, the majority points out in its Resolution, “if a company holds data related to children, then the reading level of the content must be accessible for those children. In the same sense that if a company handles data related to a common person then the reading level should be understood by a common person.”³⁷

While the majority’s statements in its Resolution are not incorrect, they fail to consider that the principle of transparency is context-specific. Simply stating “common person” is not enough because the “common person” for a simple transaction may be different from the “common person” for a complicated transaction. As the Guidelines explain, the important thing to consider is the “**average member of the intended audience...** [such that] a controller collecting the personal data of working professionals can assume its audience has a higher level of understanding than a controller that obtains the personal data of children.”³⁸

³⁷ Resolution, NPC Case No. 17-001, p. 4, *citing* Fergal McGovern, *The GDPR and Plain Language: What you need to do to comply*, available at <https://www.cmswire.com/digital-experience/the-gdpr-and-plain-language-what-you-need-to-do-to-comply/>.

³⁸ Guidelines on Transparency under Regulation 2016/679 of the Article 29 Working Party, 11 April 2018, *available at* https://ec.europa.eu/newsroom/article29/item-detail.cfm?item_id=622227. Emphasis supplied.

The 2013 version of the AE Terms and Conditions provide:

19. **Consequences of Default.** The following shall be consequences of default, whether singly, concurrently, or successively:

xxx

b) All monies, securities, and things of value that are now or may hereafter be in the hands of the ISSUER or any of its Related Companies or both, on deposit or otherwise to the credit of or belonging to the CARDMEMBER, shall be deemed assigned to the ISSUER effective upon the occurrence of default. **The ISSUER is also authorized, without need of notice to the CARDMEMBER, to automatically debit his/her deposit account** for such amount as may be sufficient to cover full payment of the outstanding balance, or to sell at public or private sale such securities or things of value owned by CARDMEMBER and then to apply the proceeds of such sale to any outstanding obligation of CARDMEMBER;

c) Any funds of the CARDMEMBER that may now or later be in the hands of the ISSUER or any of its Related Companies will be **applied and set off against any amounts due and payable** on the CARDMEMBER's CARD account.³⁹

From the earlier discussion on the requirement of "clear and plain language," there is no basis to find the 2013 version as violative of the transparency principle. The information provided is definitive; it does not leave room for different interpretations. The sentences do not contain language qualifiers such as "may", "might", or "possibly." Its real intent is evident, by using terms such as "automatically debit", "apply", and "set off." The heading itself, "Consequences of Default" indicates that it talks about the remedial measures that the respondent bank may resort to. It is neither ambiguous nor overly broad. The language is that which is typically found in contracts involving credit transactions of similar nature.

Aside from this, the complainant, by his own admission, has been a cardholder of AE Platinum since 2005 and a depositor of ODB since 2014.⁴⁰ From the website of AE, it can be seen that complainant's AE card is the highest tier non-dollar charge credit card offered by AE and requires a minimum annual income of Php 1,800,000.00 in order to

³⁹ Respondent ODB's Comment dated 05 April 2017, Annex "8". Emphasis supplied.

⁴⁰ Complainant's email complaint to the National Privacy Commission dated 26 January 2017.

qualify.⁴¹ It is reasonable to expect that average member of the intended audience, *i.e.* persons with at least that level of income among others, would have a sufficient level of understanding to appreciate such terms as “default,” “credit,” “debit,” “obligation,” “deposit account” as well as the other information being provided to them in the AE Credit Card Terms and Conditions.

The change in the Terms and Conditions is not an acknowledgment of a lack of transparency in the Terms and Conditions signed by the complainant.

In an effort to provide additional justification for respondent ODB’s supposed violation of the transparency principle, the majority examined two (2) versions of AE Credit Card’s Terms and Conditions: the 2013 version, as attached by respondent ODB, and the 2019 version, as found in the ODB website.⁴² Finding variations in the provisions, the majority stated that “the very fact that Respondent ODB made changes in its terms and conditions is at the very least an acknowledgment of the lack of full transparency in the terms and conditions signed by [the] complainant.”⁴³ Although this analysis by the majority is appreciated, I cannot agree with their conclusion after comparing the two provisions.

2013 Version	2019 Version
<p>19. Consequences of Default. The following shall be consequences of default, whether singly, concurrently, or successively:</p> <p style="text-align: center;">xxx</p> <p>b) All monies, securities, and things of value that are now or may hereafter be in the hands of the ISSUER or any of its</p>	<p>20. Consequences of Default. The following shall be the consequences of default, whether singly, concurrently, or successively:</p> <p style="text-align: center;">xxx</p> <p>b) “the ISSUER may, and is hereby authorized by the CARDMEMBER to set off as full or partial payment, and/or</p>

⁴¹ See <https://www.americanexpress.com/ph/network/product-landing/membership-rewards.html>.

⁴² Terms and Conditions for issuance and use of the AE Credit Cards available at <https://www.odbc.com/ph/sites/default/files/pdf/AE-TCS.pdf/March2019>

⁴³ Resolution, NPC Case No. 17-001, p. 9.

Related Companies or both, on deposit or otherwise to the credit of or belonging to the CARDMEMBER, shall be deemed assigned to the ISSUER effective upon the occurrence of default. **The ISSUER is also authorized, without need of notice to the CARDMEMBER, to automatically debit his/her deposit account** for such amount as may be sufficient to cover full payment of the outstanding balance, or to sell at public or private sale such securities or things of value owned by CARDMEMBER and then to apply the proceeds of such sale to any outstanding obligation of CARDMEMBER;

c) Any funds of the CARDMEMBER that may now or later be in the hands of the ISSUER or any of its Related Companies will be **applied and set off against any amounts due and payable** on the CARDMEMBER's CARD account.⁴⁴

withhold, to the extent permitted by law, at ISSUER's option and without need of prior notice all the monies, funds, and/or proceeds of securities, investments or receivables which may come into the possession or control of the ISSUER and/or its Related Companies, to apply the same in satisfying any or all obligations of the CARDMEMBER to the ISSUER, whether left with them for safekeeping or otherwise, or coming into any of their hands in any way, to settle any and all obligations of the CARDMEMBER to the ISSUER. **CARDMEMBER irrevocably authorizes ISSUER and/or its Related Companies to debit such amounts as may be necessary to implement this provision from any of the CARDMEMBER's accounts with the ISSUER and/or its Related Companies, immediately after which due notice shall be sent to the CARDMEMBER.** In addition, all such properties, receivables or securities in the possession or control of the ISSUER and/or its Related Companies are hereby ceded, transferred and conveyed by way of assignment unto ISSUER in order that the same may be used to satisfy any and all obligations of the CARDMEMBER to the ISSUER in accordance with this provision. For such purpose, and to effectively carry out the powers granted herein, CARDMEMBER hereby unconditionally or irrevocably names and constitutes ISSUER and/or its Related Companies to be his/her true and lawful attorney-in-fact xxx **For the foregoing purposes, the CARDMEMBER hereby waives his/her rights in favor of the ISSUER and/or its Related Companies under...Republic Act 10173 (Data Privacy Act of 2012)** and other laws/regulations, including all subsequent amendments or supplements thereto, relative to the confidentiality or secrecy of bank deposits, accounts, placements, investments and similar or

⁴⁴ Respondent BODB's Comment dated 05 April 2017, Annex "8". Emphasis supplied.

	related assets in the custody of the ISSUER and/or its Related Companies. ⁴⁵
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Contrary to how the majority finds the 2019 version as an “appropriate response by Respondent- ODB to make its Terms and Conditions more understandable to the subject [sic],”⁴⁶ even a cursory reading of the two versions would show that they are substantially the same on all the important points except that subsections (b) and (c) in the 2013 version have now been merged into subsection (b) in the 2019 version. The terms “debit,” “apply,” “set-off,” and other legal terms are still used such that it can hardly be said that the 2019 version has already cured the supposed issues the majority found in the previous version.

In fact, rather than being the “appropriate response” the majority claims it to be, the 2019 version is more problematic for data subjects since it contains an improper waiver of rights under the DPA. Surely a waiver of the fundamental human right to informational privacy enshrined in the DPA cannot be said to have “fairness to the data subject in mind” as the majority claims.

In light of all these considerations, I vote to **GRANT** the Motion for Partial Reconsideration based on a finding that there was no violation of the principle of transparency.

(sgd)
LEANDRO ANGELO Y. AGUIRRE
Deputy Privacy Commissioner

⁴⁵ Terms and Conditions for issuance and use of the AE Credit Cards available at <https://www.odb.com.ph/ph/sites/default/files/pdf/AE-TCS.pdf/March2019>. Emphasis supplied.

⁴⁶ Resolution, NPC Case No. 17-001, p. 10.