



REPORT OF THE ADJUDICATOR

WASPA Member (SP)	Cointel
Service Type	Telerotica Adult SMS Chat Service
Source of Complaints	Public
Complaint Number	#0071

Complaint

A complaint was received from a parent regarding his son's use of an adult SMS chat service. The complainant alleges:

- His son, a scholar, accumulated costs of some R25 000 over a two month period (Jul-Aug 2005), after being enticed to participate in adult SMS chat lines.
- His son received an unsolicited SMS to participate.
- No explicit confirmation was obtained about his son's age nor information about the person who is responsible for the account.

The complainant did not raise any specific potential breach of the WASPA Code of Conduct, however and for the reasons more fully set out below, the following potential breaches of the WASPA Code of Conduct were considered:

2.1. An **"adult service"** is any service where the content or product is of a clearly sexual nature, or any service for which the associated promotional material is of a clearly sexual nature, or indicates directly, or implies that the service is of a sexual nature.

2.9. A **"contact and dating"** service is any service intended to enable people previously unacquainted with each other to make initial contact and arrange to meet in person.

5.2.1. Any commercial message is considered unsolicited (and hence spam) unless:

- (a) the recipient has requested the message;
- (b) the message recipient has a direct and recent prior commercial relationship with the message originator and would reasonably expect to receive marketing communications from the originator; or
- (c) the organisation supplying the originator with the recipient's contact information has the recipient's explicit consent to do so.

5.3.1. Members will not send or promote the sending of spam and will take reasonable measures to ensure that their facilities are not used by others for this purpose.

8. Adult services

8.1. Required practices

8.1.1. Any adult service must be clearly indicated as such in any promotional material and advertisements.

8.1.2. Promotions for adult services must be in context with the publication or other media in which they appear. Services should be in context with the advertising material promoting them. The content of a service should not be contrary to the reasonable expectation of those responding to the promotion.

8.1.3. Members must take reasonable steps to ensure that only persons of 18 years of age or older have access to adult services. Explicit confirmation of a user's age must be obtained prior to the delivery of an adult service.

8.2. Prohibited practices

8.2.1. Adult services must not contain references that suggest or imply the involvement of children.

8.2.2. Promotions for adult services must not appear in publications or other media specifically targeted at children.

10.2. Restrictions on the service

10.2.1. Members must take reasonable steps to ensure that users of contact and dating services are authorised by the bill-payer to use that service.

10.2.2. Providers of contact and dating services must take reasonable steps to ensure that no children use the services.

Investigation

The Secretariat received a response from the SP as follows:

- **At the outset we record that it has not been indicated which section of the WASPA Code we are alleged to be in breach of, and it is therefore impossible for us to respond to the complaint in full. We request therefore that you refer us to the relevant section of the Code, and afford us the opportunity to respond in more detail. Our rights in this regard are and remain reserved.**
- **Notwithstanding the above, as a gesture of good faith we have decided to respond as best we can in the circumstances.**
- **The complaint as we understand it has three legs, viz:**
 - **(a) that the complainant's son received an unsolicited sms which enticed him to participate in the SMS Chat service;**
 - **(b) that no explicit confirmation was obtained about the user's age; and**
 - **(c) that no information was obtained about the person who is responsible for the account.**
- **Dealing with each of the above in turn we advise as follows:**

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- (a) We deny that the user received an unsolicited SMS. It is a term of use of all the Telerotica services that users agree to receive promotional SMS's on an ongoing basis. In fact the user in question has been regularly utilizing the services of Telerotica since October 2004, and has by his use of those services agreed to receive promotional SMS's, and/or has a prior commercial relationship with Telerotica and could reasonably expect to receive promotional SMS's. Any SMS that he may have received (and we do not necessarily admit that he did receive an SMS that enticed him to use the SMS chat service) would therefore not have been unsolicited.
 - (b) We deny that no explicit confirmation was obtained about the user's age. We have checked the logs from the chat sessions from which it is clear that the user is asked on a number of separate occasions by the SMS chat operator how old he is, and each and every time the user expressly claims to be 18 years old. These logs can be made available to you on request.
 - (c) We deny that it is a specific requirement of the Code that information must be obtained about the person who is responsible for the account. In any event the responsibility must lie with the bill payer to ensure that he is aware of the costs being incurred by the person using the phone. In this instance the user had been making use of Telerotica's services since October 2004. The bill payer therefore had more than 12 months to check the account and confirm that he was comfortable with the services that were being used. Despite this, the bill payer either did not avail himself of this opportunity, or did but accepted such use. In either event we believe that it is unreasonable for a complaint to be lodged after 13 months of regular use of the services.

Point *in limine*

The Adjudicator had regard to the fundamental objectives of the WASPA Code of Conduct, being “to ensure that members of the public can use mobile services with confidence, assured that they will be provided with accurate information about all services and the pricing associated with those services. The Code aims to equip customers and consumers with a mechanism for addressing any concerns or complaints relating to services provided by WASPA members, and a framework for impartial, fair and consistent evaluation and response to any complaints made.” The Code of Conduct further provides as its primary objectives setting “standards for advertising mobile application services, and includes a framework for the provision of adult services, to ensure adequate protection of children from potentially harmful content.”

The Adjudicator considered the point raised *in limine* by the SP concerning the complainant's failure to provide details of the specific clauses of the WASPA Code of Conduct the SP is alleged to have breached. The Adjudicator further noted the SP's specific request that such details be provided. As the WASPA Code of Conduct procedure does not contemplate the SP's response to a complaint being referred to the complainant for a further response, this request could only have been whether addressed to the Secretariat or the

Adjudicator. While the WASPA Code of Conduct does not expressly prohibit the Adjudicator formulating the specific breaches of the Code of Conduct on which he is to rule, it raises a potential conflict of interest and raises a question concerning the independence of the Adjudicator and as such is best left to the Secretariat.

The on-line complaints form accessible from the WASPA Internet web site contains a question requesting details of the sections of the WASPA Code of Conduct the complainant alleges have been breached. As many complainants are unfamiliar with the WASPA Code of Conduct, this question is on occasion left blank, as in the instant complaint.

The Adjudicator had regard to the decision of the Appeal Panel in respect of Complaint #0001 and is in agreement that an SP cannot be found in breach of the WASPA Code of Conduct, unless it has had an opportunity to respond fully to the complaint. This is a clear indication of the fundamental right of a person (including a corporate entity such as the SP) to be heard before a decision is made on a matter that affects it (the so called "*audi alteram partem*" principle) and the further right of the SP to know and understand the charges raised against it and what the consequences thereof are.

This raises the question of what standard of fairness must be applied when considering the WASPA Code of Conduct and the actions of the Secretariat and the Independent Adjudicator in terms thereof. The Appeals panel in Complaint #0001 referred to the Constitution of the Republic of South Africa (the "Constitution") and the Promotion of Administrative Justice Act, Act 3 of 2000 ("PAJA").

Section 33 of the Bill of Rights provisions of the Constitution provides:

Just administrative action

33(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

PAJA contains the following definitions:

'administrative action' means any decision taken, or any failure to take a decision, by -

(a) an organ of state, when -

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; or

(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,

'administrator' means an organ of state or any natural or juristic person taking administrative action;

'decision' means any decision of an administrative nature made, proposed to be made, or required to be made, as the case may be, under an empowering provision, including a decision relating to-

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- (a) making, suspending, revoking or refusing to make an order, award or determination;
 - (b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;
 - (c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;
 - (d) imposing a condition or restriction;
 - (e) making a declaration, demand or requirement;
 - (f) retaining, or refusing to deliver up, an article; or
 - (g) doing or refusing to do any other act or thing of an administrative nature, and a reference to a failure to take a decision must be construed accordingly;

'empowering provision' means a law, a rule of common law, customary law, or an agreement, instrument or other document in terms of which an administrative action was purportedly taken;

3 Procedurally fair administrative action affecting any person

(1) Administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

(2) (a) A fair administrative procedure depends on the circumstances of each case.

(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1) -

- (i) adequate notice of the nature and purpose of the proposed administrative action;
- (ii) a reasonable opportunity to make representations;

According to Lawrence Baxter, *Administrative Law* (1984) 2 general administrative law consists of the 'general principles of [common] law which regulate the organisation of administrative institutions and the fairness and efficacy of the administrative process, govern the validity of and liability for administrative action and inaction, and govern the administrative and judicial remedies relating to such action or inaction'. While Baxter's definition pre-dates both PAJA and the Bill of Rights, it is useful as it seems to exclude a voluntary industry representative body, such as WASPA, as it is not an "administrative institution".

Ian Currie & Johan de Waal in Chapter 29 of *The Bill of Rights Handbook* (5 ed) (2004) are of the opinion that a voluntary procedure, such as the WASPA Code of Conduct procedure, is not administrative as it is an exercise of private and not public power and therefore not subject to the administrative justice rights in the Constitution. They also indicate that some regard such a process as quasi-judicial in nature and for that reason not subject to the administrative justice rights in the Constitution (though Currie and de Waal are of the view that the epithet 'judicial' should be reserved for dispute-resolution by individuals or entities possessing constitutional judicial authority). In this regard Currie and de Waal refer to *R v Disciplinary Committee of the Jockey Club: ex parte Aga Khan* [1993] 2 All ER 853 (Jockey Club's powers not 'governmental' in nature, not performing 'the business of government'). This is a more qualified and restrictive interpretation of the phrase than that

proposed by Van Reenen J in *Van Zyl v New National Party* [2003] 3 All SA 737 (C) para 75 (“exercising a public power” conveys the ability to act in a manner that affects or concerns the public’). The phrase ‘concerns the public’ is certainly too wide. See *Marais v Democratic Alliance* 2002 (2) BCLR 171 (C) para 51 which makes the point that mere public interest in a decision does not make it an exercise of public power or the performance of a public function.

PAJA does recognise that juristic persons (such as WASPA) may perform administrative acts, but only “when exercising a public power or performing a public function in terms of an empowering provision”, bearing in mind that the definition of an “empowering act” includes “an agreement, instrument or other document in terms of which an administrative action was purportedly taken”.

Having regard to the above, it can be seen that the question of whether the WASPA Code of Conduct and the actions of the Secretariat and Independent Adjudicator in terms thereof are an administrative act or not, is a complex one. It is the view of the Adjudicator that such actions are not administrative acts, nevertheless the Adjudicator is willing to consider the standard set for administrative acts by the Bill of Rights and PAJA as a goal for the Secretariat and Adjudicator to strive towards and if possible meet or exceed, but not a requirement.

Bearing this in mind the Draft Code of Good Administrative Conduct in terms of PAJA interprets the procedure in terms of Section 3(2)(b) of PAJA as requiring adequate notice of the nature and purpose of the proposed administrative action to be given to the affected person, before the decision is taken. “Adequate notice” is defined as meaning that “the affected person must be informed that an administrative action is being planned. The person must be given enough time to respond to the planned administrative action. The person also needs to be given enough information about the planned administrative action to be able to work out how to respond to the planned action.”

In this regard, the Adjudicator is of the view that the complaint sets out in significant detail the possible breaches of the Code of Conduct and the SP has responded comprehensively to the factual allegations of the complaint. Had the Adjudicator found a prima facie indication of a breach of the WASPA Code of Conduct by the Complainant (dealt with more fully below), it would have been procedurally proper, but not essential, for the Adjudicator to request the Secretariat to notify the SP of the specific Clauses of the Code of Conduct in respect of which the complaint was being considered and to request a specific response thereto. These could then be considered by the Adjudicator or if such initial consideration had led the Adjudicator to form an opinion that may cause his independence to be compromised, he could recuse himself and request the appointment of a new Adjudicator.

As such, the Adjudicator considered the complaint, without the necessity of giving the SP the details of the specific clauses of the WASPA Code of Conduct alleged to have been breached. The Adjudicator is further of the view that details of the specific Clause of the WASPA Code of Conduct alleged to have been breached need not be provided in all circumstances and particularly need not be provided where these are clear from the complaint itself.

Decision

The Adjudicator did not uphold the complaint for the following reasons:

- The Telerotica service offered by the SP is not a “contact and dating” service as defined in the WASPA Code of Conduct, as it facilitates communication between users and is not intended to facilitate a meeting “in person” as required by the Code. As such, the requirements of Clause 10.2 of the Code and specifically the obtaining of authorisation of the bill-payer and the additional obligation to restrict access by children, does not apply to the SP’s service. This may be a fundamental flaw in the definition of “contact and dating” services in the WASPA Code of Conduct, however the Adjudicator does not have the power to extend this definition to the SP’s service.
- The SP has indicated the existence of a commercial relationship with the user since October 2004 and as such the transmission of commercial messages intended to incite or induce the user to continue to use the SP’s service does not breach Clauses 5.2 or 5.3 of the WASPA Code of Conduct.
- On testing and review of the SP’s service, the Adjudicator is of the view that the SP’s procedures to verify the age of a user are reasonable. They are obviously not sufficient, otherwise the complainant’s son would not have been able to access the service concerned. Again, this may be a flaw in the WASPA Code of Conduct, however the Adjudicator does not have the power to find a breach of this provision due to the sympathy he feels for the complainant. In addition, there was no indication of dishonesty on the part of the SP.

The Adjudicator recognises the significant financial loss that has been occasioned to the complainant and the significant harm that could befall a child exposed to adult services, such as that provided by the SP. As such, the Adjudicator recommends to the SP that it re-evaluate its age verification processes to avoid the future occurrence of such situations, or at least reduce the risk thereof. The Adjudicator recognises that authentication of a potential user and verification of their age is fraught with difficulty where there is no “face to face” interaction, however encourages the SP to introduce additional measures in this regard.

The Adjudicator further recognised that the SP contracted with the user himself. As the user is a minor, under South African contract law he is entitled to resile from such contract. In the instant circumstances however, there is a further contractual chain between the SP, the network operator providing services to the complainant and the complainant himself. The complainant in turn authorised his son to incur certain expenses on the account with the network operator, without making him a party to such contract. His son appears to have exceeded such authority. As payment has been effected by means of the latter contractual chain and not the contract between the complainant’s son and the SP, the Adjudicator could find no basis in law to justify a finding against the SP.