

REPORT OF THE ADJUDICATOR

Complaint reference number: #12435

WASPA member(s): Nashua Mobile (the Service Provider or “SP”)

Information Provider(s): Bayport Cellular (the “IP”)

Membership number(s): 0013

Complainant: Public

Type of complaint: Unsolicited SMS (SPAM)

Date complaint was lodged: 2011-03-24

Date of the alleged offence: 2011-03-24

Relevant version of the Code: 10.0

Clauses considered: 4.1.1, 5.2.1, 5.3.1, 6.2.2

Relevant version of the Ad. Rules: 2.3

Clauses considered: 11.2.1, 11.2.4, 11.3.1, 11.3.3

Related cases considered: Not applicable

Complaint

Complaint # 12435 was logged by the Media Monitor on 24 March 2011, regarding an unsolicited SMS. She received the following message on her personal phone:

**“Are you permanently employed for 6 months? Get the hottest phones +
airtime on contract!! SMS MAG to 32681 apply. Reply STOP to opt out.
Blacklisted welcome”**

The complaint was initially logged for resolution via the informal complaint procedure and the informal complaint was accordingly sent to the SP on 24 March 2011, giving it 5 working days to respond to the Media Monitor’s complaint. In her complaint, the Monitor identifies clause 4.1.1 of the Code (members must have honest and fair dealings with their customers, and pricing information for services must be clearly and accurately conveyed). In this regard, she notes that there was no cost displayed for sms’ing MAG to 32681. She also cited a breach of clause 5.2.1 of the Code in relation to unsolicited commercial messages (the detail of this section is cited and discussed below). She also stated:

“I would also like to know where this SP got my number from, and where I provided consent to receiving this message.”

The informal complaint notification sent by WASPA on 24 March 2011 noted that remedial options recommended to the SP were as follows:

“If this advert or marketing message is altered immediately and a copy of the amended advert provided to the WASPA Secretariat, it is likely that this complaint can be resolved informally. This remedy might prevent fines from being imposed for breaches of the WASPA Code. The WASPA Monitor requests that the service provider provide a clear plan of action for dealing with this advert, for example:

- **This advert has been withdrawn and will not be flighted from [date].**
- **The following changes have been made to the advert: ...**
- **The revised advert is schedule to appear again on [date].”**

Service Provider's response

On 5 April 2011 the SP responded, stating as follows:

“We unsubscribed this user from our client's SMS Gateway product, and subsequent to our communicating this action to our client Bayport Financial Services t/a Bayport Cellular, they followed suit and removed the user from their mailing list. [...] I have attached the email wherein Bayport confirms that they too removed the client, preventing any further sms communications.”

The attached email confirmed that Bayport Cellular (hereafter referred to as “the IP”) had added the Complainant to the “Do Not Contact List”, and that she would not be marketed to in the future.

This information was passed on to the Monitor, who, on 6 April 2011, noted the unsubscribe action but again requested the SP to provide details of how her number was obtained, and when (and to whom) consent was given for it to be used for direct marketing purposes. On 7 April 2011, the SP passed on to WASPA a more detailed response received from the IP, as follows:

“We have acquired this data through a data supplier by the name of Telegenix during the course of last year. It is important to note that all clients are assumed “opt in” unless otherwise specified by the client or if the client is on the Direct Marketing Association of South Africa's Do Not Contact List. We run various dedupes which is part of our Internal Leads Management policy and deduping against the D.M.A. Do Not Contact List is our first check. We also have an internal Do Not Contact List against which we dedupe so if the client is not on any of these lists we will call him/her.”

In response to this correspondence, the Monitor wrote to WASPA on 7 April 2011 as follows:

“I contacted Telegenix who have requested I send them an email with my name, contact number and ID number. [...] My ID number and my

Cellphone number forms part of my personal information. I would still like to know where my consent was given. Nashua must please take this up with Telegenix and provide answers to my questions. In addition to the breaches already part of this compliant, these breaches also apply:

4.2.1 WASPA and its members must respect the constitutional right of consumers to personal privacy and privacy of communications.

4.2.2 Members must respect the confidentiality of customers' personal information and will not sell or distribute such information to any other party without the explicit consent of the consumer, except where required to do so by law."

Later that same day the Monitor also wrote:

"A further breach to be forwarded to Nashua Mobile:

11.1.3 The sender must within 10 business days provide the recipient with details of how the sender obtained the recipients cellphone number, when such details are requested by the recipient. The details provided to the consumer must be specific. Thus, a response that indicates that the details were obtained e.g. "from a database" is not specific. "

On 11 April the SP confirmed to WASPA that it had requested the detailed information regarding where the distributing company Telegenix had obtained the Complainant's details from. In further correspondence dated 12 April, the SP stated that it was the IP which needed to contact Telegenix directly to escalate the issue, as the SP was not a customer of Telegenix and Telegenix had indicated in correspondence that it would rather deal directly with the IP, which needed to provide certain information to it (including the Monitor's ID number), in order for Telegenix to locate the data. On 14 April, the SP passed on to WASPA an email from the IP, which simply stated that in terms of the "*origination of the record*", the IP could not provide the SP with this information as it was not in possession thereof, but that it was waiting for Telegenix to produce the origin of the Monitor's details.

Additional correspondence was also produced in this matter evidencing further communications between the SP and Telegenix from which it is evident that the SP (and Telegenix) repeatedly confused the Monitor with one "Mr Visser" resulting in a series of miscommunications about which complaint needed to be investigated by the SP. This correspondence is irrelevant for the purposes of this complaint.

Eventually, on 15 June, Telegenix e-mailed the Monitor directly, advising her as follows:

"Purchased list from AB networkings."

This is all that the e-mail says. In her response to WASPA on the same day, the Complainant notes that this communication tells her nothing, and does not show when and to whom her consent was given. The matter was then referred for formal adjudication.

Sections of the Code considered

“4.1.1. Members must have honest and fair dealings with their customers. In particular, pricing information for services must be clearly and accurately conveyed to customers and potential customers.”

“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 (within the last six months) 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.”

“6.2.2. All advertisements for services must include the full retail price of that service.”

Sections of the Advertising Rules considered

“11.2.1 Text clearly Showing Access Cost and T&C for each service or Content type offered”

“11.2.4 The sender must within 10 business days provide the recipient with details or how the sender obtained the recipients cellphone number, when such details are requested by the recipient. The details provided to the consumer must be specific. Thus, a response that indicates the details were obtained e.g. “from a database” is not specific.”

“11.2.5 Contact details of the sender are obligatory. The contact details must not use any premium rated fax, PSMS, USSD, WAP, or IVR lines. A web site address is the preferred method.”

“11.3.1 Display Text with full pricing information must be displayed on the SMS/MMS.”

“11.3.3 The SMS must contain contact details of the sender, preferably a web site address.”

Decision

Despite the attempt of the parties to settle this complaint by way of the informal complaint procedure, resolution was not achieved and it falls on me to consider the complaint with reference to the Code and the Advertising Rules.

I will firstly consider the unsolicited nature of the SMS complained of. Section 5.2.1 of the Code states:

“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 (within the last six months) 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."**

Clearly, none of circumstances contained in 5.2.1(a), (b) or (c) was established by the SP or IP. Whilst the SP did obtain the information as to where the lead originated, it did not show that (a), (b) or (c) occurred. The message received by the Complainant was accordingly unsolicited, and hence spam as contemplated by clause 5.2.1 of the Code. Clause 5.3.1 of the Code states as follows:

"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."

The fact that the SP and/or IP had run "various dedupes" and that the Monitor's number was not on the DMA's (and the IP's internal) "Do Not Contact List" does not exonerate the parties from their obligations in terms of clause 5.2.1 and 5.3.1 of the Code.

To recap, the message that is the subject of this complaint stated as follows:

"Are you permanently employed for 6 months? Get the hottest phones + airtime on contract!! SMS MAG to 32681 apply. Reply STOP to opt out. Blacklisted welcome!"

As pointed out by the Monitor, there is no quoted pricing for sms'ing MAG to 32681. In this regard, a few clauses of the Code and Advertising Rules are relevant. Clause 4.1.1 of the Code states:

"4.1.1. Members must have honest and fair dealings with their customers. In particular, pricing information for services must be clearly and accurately conveyed to customers and potential customers."

In addition, section 11 of the Advertising Rules generally pertains to SMS/MMS Advertisements. The following obligatory sub-sections are relevant:

"11.2.1 Text clearly Showing Access Cost and T&C for each service or Content type offered"

"11.2.4 The sender must within 10 business days provide the recipient with details or how the sender obtained the recipients cellphone number, when such details are requested by the recipient. The details provided to the consumer must be specific. Thus, a response that indicates the details were obtained e.g. "from a database" is not specific.

"11.2.5 Contact details of the sender are obligatory. The contact details must not use any premium rated fax, PSMS, USSD, WAP, or IVR lines. A web site address is the preferred method."

"11.3.1 Display Text with full pricing information must be displayed on the SMS/MMS."

“11.3.3 The SMS must contain contact details of the sender, preferably a web site address.”

It is clear from the face of the message received by the Monitor that sections 11.2.5, 11.3.1 and 11.3.3 of the Advertising Rules have been breached.

It is also clear from the facts of the matter than section 11.2.4 of the Advertising Rules as well as section 5.3.1 of the Code have been breached.

Given the facts and responses of the IP in this matter, I am also of the opinion that there are reasonable grounds to suspect that the sending of further messages on behalf of the IP may result in further breaches of section 5.3.1 of the Code.

Sanctions

1. The SP is fined an amount of R6 000.
 2. In the event that the above fine is not paid to WASPA within 5 working days of the publication of this report, then the SP shall immediately suspend all services to the IP until such time as the above fine has been paid, together with interest thereon at the rate of 15,5% per annum from the date of publication of the report.
 3. WASPA is requested to issue an information provider notice notifying all members:
 - 3.1 that Bayport Financial Services t/a Bayport Cellular has been determined to have engaged in conduct that amounts to a breach of section 5.3.1 of the WASPA Code of Conduct by sending an unsolicited marketing communication to a cellphone number obtained from a database provided by a company known as Telegenix; and
 - 3.2 that with effect from the date of publication of this adjudication report, any member permitting Bayport Financial Services t/a Bayport Cellular to persist in such conduct may be held to be in breach of the same sections of the Code and subject to appropriate sanctions in terms of sections 14.3.15 and 14.4 of the Code.
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