



## REPORT OF THE ADJUDICATOR

<b>Complaint reference number:</b>	14638
<b>WASPA member(s):</b>	Peach Mobile aka Plum Solutions (IP) (1068) / Integrat (SP) (0030)
<b>Membership number(s):</b>	IP (1068) / SP (0030)
<b>Complainant:</b>	Public
<b>Type of complaint:</b>	SPAM
<b>Date complaint was lodged:</b>	2011-08-29
<b>Date of the alleged offence:</b>	2011-08-29
<b>Relevant version of the Code:</b>	11.0
<b>Clauses considered:</b>	4.2.1, 5.1.10, 5.2.1 & 5.3.1
<b>Relevant version of the Ad. Rules:</b>	Not applicable
<b>Clauses considered:</b>	N/A
<b>Related cases considered:</b>	10859, 11651, 14567

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### Complaint

The Complainant alleged that the SP in this matter SPAMMED him and the Complainant further requested to know where his personal information was obtained from.

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### Service and Information provider's response

The SP asked the Complaint to be redirected to the IP in this matter. Although the IP offered an informal reply directed at the Complainant, it refrained from responding with a formal reply. The SP also indicated same.

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### Sections of the Code considered

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

5.1.10. Upon request of the recipient of a direct marketing message, the message originator must, within a reasonable period of time, identify the source from which the recipient's personal information was obtained, and provide proof that the organisation supplying the originator with the recipient's contact information has the recipient's explicit consent to do so.

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

- (a) the recipient has requested the message;
- (b) the message recipient has a prior commercial relationship with the message originator and has been given a reasonable opportunity to object to direct marketing communications:
  - (i) at the time when the information was collected; and
  - (ii) on the occasion of each communication with the recipient; 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.

14.3.14. On the basis of the evidence presented, the adjudicator will decide whether there has been a breach of the Code. Each case will be considered and decided on its own merits.

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## Decision

In adjudicating a matter the Adjudicator has to rely on the information submitted and hence presented to him/her. The Adjudicator has taken note of the Complaint and the IP's subsequent failure to formally reply.

It also has to be stated, that the onus of proof to rebut the claims levelled by the Complainant, rests on the SP.

On the basis of the evidence presented, the Adjudicator will then decide whether there has been a breach of the Code as stipulated in section 14.3.14.

The IP failed to formally respond and the Adjudicator has therefore no alternative but to find the IP in breach of sections 4.2.1, 5.1.10, 5.2.2 and 5.2.3.

Notwithstanding the provisions of the WASPA Code of Conduct and its members subscription to the Code and the sections contained therein, the Adjudicator (for clarification purposes) wants to address some of the issues that have arisen since the promulgation of the Consumer Protection Act of 2008 (CPA).

At no stage must this be interpreted as legal advice or a legal interpretation of the CPA. It is merely stipulated here to clarify some confusion that might have arisen.

Various SMS marketers have relied on the provisions that are levelled in section 11(2) of the CPA, aiming to justify the opt-out provision in terms of SMSs. They offer this as a blanket provision to SPAM consumers.

What these marketers are however fail to realise, is that in terms of section 11(5) of the CPA, **no person** may charge a consumer a fee for making such an opt-out request. The CPA does not make mention of a transmission fee or the justification thereof, it only states that **no person** may charge a consumer a **FEE**.

This seems to be impossible when opting-out via SMS (transmission fee), therefore, in the opinion of the Adjudicator, rendering SMS marketing without the ambit of section 11(2).

Marketers also fail to realise, that in terms of the Electronic Communications and Transactions Act of 2002 (ECT Act), section 45(1)(b) is very clear on the fact that where a consumer requests where the marketer has obtained his information, the identifying particulars of the source must be provided.

Nothing in the CPA renders the above section void when it comes to SMS marketing.

Marketers of SMSs therefore have a statutory duty to inform customers where it obtained their information, once requested.

This seems to be in line with section 5.1.10 of the WASPA Code of Conduct which inter alia states that upon request of the recipient of a direct marketing message, the message originator must, within a reasonable period of time, identify the source from which the recipient's personal information was obtained.

The WASPA Code however takes it a step further and states that the message originator must also provide proof that the organisation supplying the originator with the recipient's contact information has the recipient's explicit consent to do so.

This would therefore bring it in line with section 5.2.1 of the Code.

As members of WASPA, SPs must conform and uphold the WASPA Code of Conduct. Although the DMA Code of Conduct and Do Not Contact List applies to its members, it does not preclude SPs dealing with such members or database providers, from ensuring that such members or database providers, comply with the provisions on commercial messages and SPAM as are detailed in the WASPA Code of Conduct to which SPs subscribe.

Failure to comply with the WASPA Code of Conduct would result in fines for its members, irrespective of other codes.

The Complaint is upheld.

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## Sanctions

In determining an appropriate sanction, the following factors were considered:

- The prior record of the IP with regard to breaches of the relevant sections of the Code of Conduct; and
- The IP's subsequent response.

The IP is instructed to ensure that the Complainant is removed from ANY of the databases it utilises and to refrain from sending the Complainant ANY communications via its facilities.

The IP is fined R 50 000-00 for its combined breaches of sections 4.2.1, 5.1.10, 5.2.2 and 5.2.3 of which R 40 000-00 is suspended for 6 (six) months.

The fine of R 10 000-00 must be paid to the WASPA Secretariat within 7 (seven) days after having received notice hereof.

The IP is also required to indicate to the WASPA Secretariat within 7 (seven) days after having received notification hereof, where it obtained the Complainant's information from, failing which will result in a further fine of R 30 000-00.