



REPORT OF THE ADJUDICATOR

Complaint reference number:	16486
WASPA member(s):	SMSPortal
Membership number(s):	SP (0139)
Complainant:	Public
Type of complaint:	SPAM
Date complaint was lodged:	2012-02-21
Date of the alleged offence:	2011-12-15
Relevant version of the Code:	11.0
Clauses considered:	5.1, 5.2.1 & 5.3.1
Relevant version of the Ad. Rules:	Not applicable
Clauses considered:	N/A
Related cases considered:	10859, 11651, 12662

Complaint

The Complainant alleged that the SP in this matter SPAMMED him. The Complainant was also not satisfied that the SP's client in this matter referred him to the DMA Do-Not-Contact List since he is of the opinion that the SP is governed by the WASPA Code of Conduct. He is also of the opinion that the SPAM received is juggled between various databases, rendering his opt-out request futile.

Service provider's response

The SP did not issue a formal response but responded to the initial unsubscribe request on 15 December 2011. The Adjudicator will utilise such response to formalise its decision for this Adjudication.

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.

5.1.1. All commercial messages must contain a valid originating number and/or the name or identifier of the message originator.

5.1.2. Any message originator must have a facility to allow the recipient to remove his or herself from the message originator's database, so as not to receive any further messages from that message originator.

5.1.3. For SMS and MMS communications, a recipient should be able to stop receiving messages from any service by replying with the word 'STOP'. If a reply could pertain to multiple services, either all services should be terminated, or the recipient should be given a choice of service to terminate. The reply 'STOP' procedure should be made clear to the recipient at the start of any messaging service, for example by including "reply STOP to opt out" in the first message sent. If it is not technically feasible for the recipient to reply to a specific message then clear instructions for unsubscribing must be included in the body of that message.

5.1.4. For SMS and MMS communications, a message recipient must be able to opt out at the lowest tariffed rate available (with the exception of reverse billed rates). If replying 'STOP' as set out in 5.1.3 will result in a charge greater than the lowest tariffed rate available, then instructions for the lowest tariffed rate opt-out must be included in every message sent to the customer.

5.1.8. Once a recipient has opted out from a service, a message confirming the opt-out should be sent to that recipient. This message must reference the specific service that the recipient has opted-out from, and may not be a premium rated message.

5.1.9. Where the words 'END', 'CANCEL', 'UNSUBSCRIBE' or 'QUIT' are used in place of 'STOP' in an opt-out request, the service provider must honour the opt-out request as if the word 'STOP' had been used.

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.

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 SP's subsequent reply.

Before evaluating whether the messages sent were indeed SPAM, the Adjudicator will first evaluate whether the SP in this matter conformed to the sections of the Code concerning commercial messages.

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 SP in this matter were granted ample time (various extensions offered by the Secretariat) to duly respond to the allegations levelled.

In its initial informal responses the SP illustrated in a very concise manner how it propounds to comply with the various sections pertaining to the sending of commercial messages. The SP seemingly complied with every aspect of commercial message sending as regulated in terms of the WASPA Code of Conduct's section 5.1.

However, it failed to comply with the second half of section 5.1.10 "...**and** provide proof that the organisation supplying the originator with the recipient's contact information has the recipient's explicit consent to do so."

The WASPA Secretariat also requested the SP to provide logs in terms of section 11.10.2 of the Code. The fact that the SP failed to respond formally highlights the problems that stem from such failure as also illustrated above from its failure to comply with section 5.1.10.

This read with section 5.2.1 (c) indicates a clear example of SPAM and from the evidence presented, negates any assumption that the SP has taken reasonable measures to ensure that its facilities are not used by its clients for spamming. This is a clear breach of section 5.3.1.

The ill-received manner in which the SP's client addressed the issue with the Complainant once again illustrates the importance of sections 5.1.10 and 5.3.1.

The Adjudicator also concurs with the Complainant's frustrations levelled at the client's response in terms of the DMA.

A client supplying a WASPA Member with information, or a SP dealing with such client, has to ensure that they comply with the provisions on commercial messages and SPAM as are detailed in the WASPA Code of Conduct to which such members subscribe.

The SP's client clearly failed and the SP failed to rebut such claim.

No proof was offered by the SP in this matter to validate any of the three pre-conditions of section 5.2.1 to negate allegations of SPAM.

The Adjudicator therefore also finds the SP in breach of sections 4.2.1, 5.1.10 and 5.3.1.

The Complaint is upheld.

Sanctions

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

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

The SP 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 SP is collectively fined R 20 000-00 for its breaches of sections 4.2.1, 5.1.10 and 5.3.1 and the SP is instructed to pay the fine to the WASPA Secretariat within 7 (seven) days after receiving notice hereof.