

REPORT OF THE APPEALS PANEL

Date:	June 2013
Appellant:	Blue Label Data Solutions
Complaint Numbers:	16761
Applicable versions:	11.6

1. BACKGROUND TO THE APPEAL

- 1.1. This is an appeal against both the finding and sanction imposed on the Appellant by the adjudicator in complaint 16761.
- 1.2. The original complaint was directed both against the Appellant and another member of WASPA - Integrat - which took the role of the “service provider” to the Appellant’s “information provider”.
- 1.3. Integrat acted as an “aggregator” of SMS messages from several “information providers”, of which the Appellant was one. The adjudicator found that Integrat had not breached any provision of the WASPA Code of Conduct and made his finding against the Appellant alone.
- 1.4. The Appellant is a full member of WASPA.
- 1.5. The original adjudication does not set the facts of this matter out in any great detail; the panel finds it necessary to contextualise its reasoning, and so it will set out the facts which, in brief, are as follows.
- 1.6. The complainant alleges that he first received unsolicited commercial email from the MSISDN listed in the complaint on the 6th of March 2009, and received such spam from this source regularly until the 17th of August 2011. During this time the complainant attempted to unsubscribe from receipt of further spam by replying “STOP” to the spam messages no fewer than three times. This was apparently to no avail. This is borne out by a log file provided by Integrat and is not denied by the Appellant.
- 1.7. On the 17th of August 2011 the complainant finally lodged an unsubscribe request via the WASPA website. On the Appellant’s version this unsubscribe request was acted upon and the complainant was removed from the Appellant’s database. The panel will assume that this really means that the complainant’s details were marked as “do not contact” or similar, as removal from the database would not allow the Appellant to give effect to the required “block”.
- 1.8. On the 15th of March 2012 the complainant received a further SMS, apparently from the Appellant, and this complaint resulted.
- 1.9. It is common cause that the messages received by the complainant were unsolicited and commercial in nature. The Appellant does not dispute that the messages would constitute “spam” as contemplated in clause 5.2 of the WASPA Code of Conduct.

1.10. It is not clear from the record which spam SMSes listed in the log file emanated from the Appellant's systems, and which were sent by other information providers. It is clear that at least one SMS was sent by an information provider called "MyTXT" which was clearly in no way connected with the Appellant.

1.11. In its submissions to the original adjudication, the Appellant alleged that while the complainant's "unsubscribe" request had indeed been processed, it was powerless to stop the SMS of 15 March 2012 from being sent to the complainant due to a "technical glitch". To quote the Appellant's original submission:

I have investigated this case and found that Information Capital ran this SMS campaign using our Integrat route inadvertently.

In short a technical glitch on the Panacea switch which we share with them and many other users, automatically switched Information Capital's campaign through our WASPA Integrat route due to their primary and secondary routes being down at the time. Based on their business rules the switch automatically provides a failover route and in this case selected our Integrat route.

Information Capital do not use WASPA routes as they are not a member but they are a member of the DMA which is aligned with the CPA regulations that provides for an opt-out path.

1.12. The Appellant quoted correspondence from Information Capital:

Information Capital apologises for any inconvenience caused to [the complainant] or Blue Label Data Solutions. Information Capital declares that the technical issue has been rectified and will not occur again. Information Capital are DMA members and have removed [the complainant] from our database.

1.13. Information Capital also noted that it "...has been audited by the Direct Marketing Association of South Africa and has been rated as a Centre of Excellence this verifies that we comply with the DMA codes of standard practice and ethics as well as all legislation within South Africa and that all sources of our data are legitimate." It also encouraged the complainant to register his details on the DMA's "Don't Contact Me Database".

1.14. The above appears to corroborate the Appellant's version, though it is apparent from the complainant's submission that he took little comfort from the reference to the DMA and its processes.

1.15. The complainant also alleged that the Appellant had "sold" his contact information to a third party. As per his email of the 19th of April 2012:

In july last year I complained to NVSC Fin Services for sms spamming me.

They told me blue label sold them the info.

1.16. The Appellant did not address this allegation in its submissions to the initial adjudication proceedings.

2. THE APPLICATION OF THE CODE AND RULES

The Code, v11.6

- 2.1. The adjudicator correctly applied version 11.6 of the WASPA Code of Conduct to this complaint. The following sections of the WASPA Code of Conduct have relevance here:

3.9.2. Where any information provider that is not a WASPA member conducts any activity governed by the provisions of this Code, and makes use of the facilities of a WASPA member to do so, that member must ensure that the information provider is made fully aware of all relevant provisions of the Code and the member shall remain responsible and liable for any breach of the Code resulting from the actions or omissions of any such information provider

3.9.3. Notwithstanding clause 3.9.2, where an information provider makes use of a member's facilities for the sending of spam or fails to comply with the provisions of 5.1.10, the member shall not be liable for any such breach unless the member failed to take the reasonable measures contemplated and provided for in 5.3.1.

5.2. Identification of spam

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.

5.2.2. Any commercial message is considered unsolicited after a valid opt-out request.

5.2.3. WASPA, in conjunction with the network operators, will provide a mechanism for consumers to determine which message originator or wireless application service provider sent any unsolicited commercial message.

5.3. Prevention of spam

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.

5.3.2. Members will provide a mechanism for dealing expeditiously with complaints about spam originating from their networks.

3. The Decision of the Adjudicator

- 3.1. The adjudicator in this matter took the view that the re-routing of the SMS under complaint was irrelevant: if the message passed through the Appellant's systems it

should have been subject to the complainant's unsubscribe request and should have not have been so routed.

3.2. Accordingly the adjudicator found that the Appellant had infringed clause 5.3.1 of the WASPA Code of conduct.

3.3. On the allegation that the Appellant had "sold" the complainant's contact details to third parties the adjudicator found as follows.

The complainant has stated in his complaint that he had been advised by another message originator on a previous occasion that it had obtained his contact details from the IP. It appears that this was again the case in the present circumstances.

3.4. The adjudicator made the following ruling as to sanction:

The previous request by the same complainant to the IP to remove him from its database, and the IP's misguided attempt to absolve itself by citing technical problems, are seen as aggravating factors.

In light of the foregoing, the following sanctions are made:

1. The IP is fined an amount of R 75 000.00.

2. The IP is formally warned to refrain from providing the complainant's contact details to other parties.

4. Grounds of appeal

4.1. On the finding of a breach of clause 5.3.1 of the Code of Conduct, the Appellant maintained the defence that it raised in its initial submission, that the message complained of was transmitted due to a "technical glitch". On this occasion, however, the Appellant provided a further depth of detail.

4.2. The following passages address facts that are not common cause.

1. The basis for our argument was based on a technical error that occurred on a SMS transit switch provided to Blue Label Data Solutions by Panacea (Pty) Ltd. Access to this switch is shared with several companies allowing their customers access to a multitude of local and international services. Blue Label Data Solutions utilise this switch to allow its customers to transmit on mobile networks via the WASP services of Integrat.

a. Due to the failure of primary and secondary systems at Panacea, failover procedures inadvertently routed traffic through Blue Label Data Solutions connection to Integrat.

b. Both the technical error and the subsequent routing were beyond the control of Blue Label Data Solutions. This anomaly could not have been anticipated due to excessive access measures already in place.

c. A written apology was submitted to WASPA by the third party that was responsible for the transmission to the complainant.

d. *It must be noted that the third party involved was not a client of Blue Label Data Solutions and it was neither aware of its transmission nor did it provide the necessary consent as requires for user accounts.*

e. *Due to the unanticipated route of this transmission via the service designated for transactional traffic, which is usually on request of a subscriber, it was not subjected to the routine screening that is standard procedure for both internal and external commercial data for Blue Label Data Solutions and its clients and account holders.*

2. *Blue Label Data Solutions ensure that its clients are aware of the Code of Conduct and encourage WAPSA membership. Regardless if any client opts for membership or not, clear provision is made in all service agreements to ensure awareness and compliance with the Code of Conduct.*

4.3. and further:

5.

b. ... the adjudicator questions how the complainant was a designated addressee if he had previously opted-out. Unfortunately, no opt-out request registered with a particular service- or information provider via SMS in response to a marketing message will guarantee or prevent the complainant from being listed as an addressee by any other provider in the industry since no central opt out mechanism exist at this time. It has to be understood that the complainant was not a designated addressee of Blue Label Data Solutions or any of its account holder.

4.4. On the allegation that the Appellant “sold” the complainant’s contact details to third parties, the following submission is made:

No relationship existed between Blue Label Data Solutions and the originator of the message. Blue Label Data Solutions further did not provide the complainants information to the originator. The adjudicators’ assumption is therefore completely inaccurate and without any basis whatsoever.

4.5. The Appellant concludes as follows:

In conclusion, Blue Label Data Solutions recognise the complex technical issues that led to this incident and its far reaching consequences. We applied multiple changes to our infrastructure since then to prevent any unauthorised or unscheduled access to our services. We need to reiterate that the transmission to the complainant took place due to circumstances beyond the control of Blue Label Data Solutions and its delivery, unintentional and without any knowledge thereof.

5. Findings of Appeals Panel

5.1. The Appellant’s version is that the “technical glitch” that caused the message that forms the basis for this complaint was such that the message bypassed its systems and accordingly was not “screened”. Presumably if the message had been “screened” then it would have been blocked at that stage.

5.2. Nothing appears in the evidence presented to the panel to contradict this version, and indeed the facts as presented by the complainant would seem to bear it out: the log file referred to in paragraph 1.6 above lists regular SMSes sent to the

complainant. These apparently stopped after the 17th of August 2011 when the first unsubscribe request was made via the WASPA website. The complainant apparently received the next SMS only on the 15th of March 2012. This long hiatus is consistent with the Appellant's version that the sending of the last SMS was not within their control.

- 5.3. The panel is satisfied that the Appellant could not reasonably have prevented the SMS that forms the basis of this complaint from being sent to the complainant. There is no firm indication in the facts that the other SMSes sent to the complainant and listed in the log originated with the Appellant. For example it appears from the record that at least one of these messages was transmitted by a third party via Integrat's systems and did not involve the Appellant at all. The panel cannot find that the Appellant was responsible for the transmission of the previous spam SMSes sent to the complainant.
- 5.4. Accordingly the panel upholds the appeal against the adjudicator's finding that the Appellant infringed clause 5.2.1 of the WASPA Code of Conduct, as well as the associated sanction.
- 5.5. Moving on to the allegation that the Appellant "sold" the complainant's contact details to third parties, the panel can simply not find support for this contention in the record beyond the complainant's bald allegation in this regard. While such practices are by no means unknown, it is not enough for the complainant to make such an allegation without substantiating his claim. With no evidence to support the contention, the panel must uphold the appeal against the adjudicator's finding and sanction in this regard.
- 5.6. The Appeal has been wholly successful, and accordingly the appeal fee should be refunded in full.