



ADJUDICATOR'S REPORT

Complaint reference number:	17872
WASPA member(s):	Cellfind (Pty) Ltd (SP) and Blue Label Data Solutions (Pty) Ltd (IP)
Membership number(s):	0019 and 1234, respectively
Complainant:	Public
Type of complaint:	Spam (unsolicited direct marketing message)
Date complaint was lodged:	2012-07-17
Date of the alleged offence:	2012-06-29 (appears to have been incorrectly stated as 2012-07-29)
Relevant version of the Code:	12.0
Clauses considered:	5.2, 5.3
Relevant version of the Ad. Rules:	Not applicable
Clauses considered:	Not applicable
Related cases considered:	10854, 11231 and 16761

The complaint

The complainant is a member of the public who also appears to be familiar with the industry. He lodged the following complaint on 2012-07-03:

The origin address was +2784000151070166 (not found on smscode.co.za) I received the following spam on my number 08XXXYYYY (redacted) o 29 Jul 2012: Get a Blackberry & another phone + Internet & airtime EVERY MONTH on Contract. Reply YES to apply or STOP to opt out.

Essentially, his complaint is that he received an unsolicited commercial message which is also referred to as spam. Both the IP and the SP are members of the Blue Label Group (“Blue Label”).

Some of the correspondence devolved into a series of attacks on the complainant’s and Blue Label’s credibility. I don’t believe it is appropriate or necessary to address those issues for the purposes of this adjudication.

SP’s and IP’s responses

The complainant was unsubscribed from the IP’s marketing databases on 2012-07-17 and the IP, apparently responding on the SP’s behalf, raised concerns about the feasibility of unsubscribing consumers from disparate marketing databases which may be used by Blue Label’s, a presumably similarly positioned providers’, infrastructure.

The members’ initial response was communicated by the IP’s Mark Hinnings on 2012-07-12:

We are an accredited Direct Marketing Association Member and adhere to all Audit requirements set out by the DMA.

There are various ways to obtain consumer data, public domain being the source we mostly obtain our data from. I requested to search for both Deeds and CIPRO information and found your information is listed on both databases. We however placed you on our internal opt out register, thus any company within the Blue Label group will not send marketing material via e-mail, to your mobile phone and essentially calls from telemarketers will become a thing of the past.

Sect. 11 of the CPA act which currently states that we need to provide you with details on how we obtained your cell number, as above, and we also by law make provision for you to opt out on the National Opt Out register run by the DMA. I can confirm that we have removed your cell number from our database, but request that you also opt out nationally on the DMA’s national register (www.optout.co.za). Please will you confirm with me on return e-mail if you need for me to escalate the matter, I copy my CEO Mark Brown on this e-mail, as discussed telephonically, he sits on the DMA’s board.

The complainant responded to Hinnings’ reply with some scepticism and escalated his complaint with the following:

Regarding the below: I clearly want this to proceed as a formal complaint. In addition, I want to place my comments below on record for the adjudicator’s attention, as well as:

- I believe that Blue Label have other adjudications against them, which would imply that past fines have not been high enough to get their attention.*
- See below also their blatant spurning of WASPA regulations against unsolicited messaging - implying that it will take a much higher fine to make them desist. In fact, a*

company which blatantly works against its industry body's terms of service should have more done to them, than a simple fine being imposed.

The IP contacted its “client” (which appears to be the SP) regarding the consent/s relied upon to include the complainant in the database/s used to communicate with the complainant and was unable to supply WASPA with any additional information in this regard by the time the case file was compiled and sent to me for review.

The IP submitted more detailed responses to the complaint on 2012-08-24 (annexed to this report and marked “A”) which addressed a number of issues highlighted in the initial correspondence between the complainant and the IP, through the WASPA Secretariat. The IP’s more detailed submissions included the following submissions which are relevant to the current complaint:

1. *Blue Label provides multiple services to an array of clients across all industries and we ensure that every potential client is aware of the WASPA code and its provisions by means of contractual agreement or encouragement that clients become WASPA members.*

2. *There is a clear misinterpretation with the explanation that “there are various ways to obtain consumer data”. Although it is noted that the complainant consider this as “a clear admission of flagrant disregard for WASPA regulations”, it has to be clearly understood that obtaining data from any source is not of a breach of any WASPA proviso. Further, there was no confirmation that the complainants details were obtained from a specific source since the confirmation of the source was not known at the time and remain unknown to date.*

3. *As a member of WASPA it is a priority for Blue Labe Data Solutions to comply with its Code of Conduct and its complaint procedure at any level. The allegation by the complainant that Blue Label Data Solutions intentions to influence the complaint procedure is without any foundation.*

4.

5. ...

6. ...

7. *Blue Label Data Solutions added the complainant's details to its DNC database although it was never listed as a recipient in the first place. This will not in any way prevent any of its clients using its own database from transmitting messages that may be considered as SPAM through its current service provider or any other channel linked to the WASPA members, affiliates or thousands of clients.*

WASPA members attempt to enforce compliance to the WASPA code of conduct through contractual agreements with its client. Although the members remain responsible for all submissions by third parties, it must be noted that these submissions are received in good faith and with the assumption that it does comply.

8. *In conclusion, WASPAs response to SPAM based on a report or complaint by a*

subscriber is relatively simple due to its reactive nature. In this case both the Service Provider and the Information provider both allowed the transmission of SPAM to the complainant by a third party. Although the service provider involved endeavour to enforce the WASPA restrictions on SPAM, unless it already registered the subscriber on its own DNC database it will not prevent the transmission of SPAM by any other party with access to its service. Unfortunately this also applies to Blue Label Data Solutions.

The WASPA member is dependent on the third party compliance but it remains responsible for any breach. As referred to in point 7, taking responsibly of a breach will however in no way whatsoever prevent a subscriber from receiving any further SPAM from other providers.

...

Essentially, the IP –

- confirmed that the SP did not supply the IP with any indication of the nature of the consent purportedly secured from the complainant;
- implied that the complainant’s personal information could have been obtained from public information sources;
- regards compliance with the Code “at any level” as a “priority”;
- pointed out that taking steps to prevent consumers’ personal information from being used by its clients to spam those consumers could prove fruitless and may not “prevent any of its clients using its own database from transmitting messages that may be considered as SPAM through its current service or any other channel linked to the WASPA members, affiliates or thousands of clients”;
- and the SP “allowed the transmission of SPAM to the complainant by a third party”; and
- questioned the effectiveness of feasibility of the WASPA complaints process or WASPA members’ efforts to prevent spam in the absence of a “compulsory national DNC register”.

Sections of the Code considered

Version 12.0 of the Code contains the following definitions and provisions which are relevant to this complaint:

2.8. A “commercial message” is a message sent by SMS or MMS or similar protocol for commercial purposes. (See also “direct marketing message” below.)

2.13. A “direct marketing message” is a commercial message sent by SMS or MMS or similar protocol that is designed to promote the sale or demand of goods or services whether or not it

invites or solicits a response from a recipient.

2.24. "Spam" means unsolicited commercial communications, including unsolicited commercial messages as referred to in clause 5.2.1.

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 direct marketing database, so as not to receive any further direct marketing messages from that message originator.

5.1.3. For commercial messages, 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 commercial messages, 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.

5.1.5. The reply "STOP" or alternative opt-out procedure must be included in all direct marketing communications. A "STOP" reply in this instance will refer to all direct marketing communications from the message originator.

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.

Decision

The complainant and the IP raised a number of broader issues relating to WASPA's efficacy as a self-regulating body which I will not address in this report because those issues are both not appropriately addressed in this forum and not relevant to the present complaint.

To paraphrase the submissions by the complainant, this complaint is about a message which was sent to the complainant and which the complainant contends was unsolicited. The offending message promoted a mobile phone and related mobile services and was, therefore, a "direct marketing message". Sections 5.1 and 5.2 of the Code therefore apply.

The SP and the IP have not adduced any evidence that the complainant consented to receive the message and, going further, the IP has essentially conceded that the message was likely unsolicited and therefore spam.

Some of the issues the IP raised in its submissions touch on section 5.3.1 of the Code which requires members to "take reasonable measures to ensure that their facilities are not used by others [to send or promote the sending of spam]". The IP argued that it is practically very difficult for it to police its clients' uses of its infrastructure.

The IP conceded that it is contractually bound to comply with the Code. It also pointed out that there are at least two ways of ensuring its clients make appropriate use of its services is contractually and by encouraging its clients to become WASPA members. The IP suggested that keeping its clients compliant with the Code using even these mechanisms may not be effective and further stated that "although it is possible to single out a specific member it will NOT prevent the complainant from receiving any further SPAM". With respect to the IP's legal representative who prepared these submissions, this is somewhat disingenuous and suggests that the IP and/or the SP may not be taking adequate steps to ensure better compliance with the Code by their clients.

I reviewed the reports for complaints 10854, 11231 and 16761 which involved the SP and/or the IP and which also addressed complaints of a similar nature. These reports go back to January 2011 in respect of complaints lodged in late 2010.

In complaint 10854, Blue Label made reference to the availability of “Public domain information” and how the personal information used in that matter was obtained from “Public records and was updated via Bureaus”. Complaint 11231 involved a similar message but the member in that matter, the SP in this complaint, does not appear to have made submissions in response to the complaint.

In the report on complaint 16761, delivered on 2012-07-31, the adjudicator also considered a spam complaint and pointed to apparently poor controls implemented by the IP to ensure that consumers’ personal information is not used for marketing purposes, particularly where the consumers concerned has opted out of receiving direct marketing messages in relation to databases managed or otherwise controlled by the IP.

While these complaints did not deal with the same facts as are present in this complaint, they do point to an awareness on the IP’s and the SP’s part of concerns about data sources used to compile or supplement their databases as well as mechanisms to ensure that consumers who have not opted in to receive direct marketing messages don’t receive them. In light of these decisions, I am satisfied that the IP’s and the SP’s contentions regarding their relative inability to prevent their services and systems being used to disseminate spam are substantially the same as those raised up to two and a half years ago in similar complaints and they do not appear to have since taken “take reasonable measures to ensure that their facilities are not used by others [to send or promote the sending of spam]”.

I therefore uphold the complaint and find against the SP and the IP, specifically that both parties infringed section 5.3.1 of the Code.

Sanctions

The SP was largely silent through this process and did not respond to requests for further information about the consent obtained from the complainant as a basis for the message sent to him. The SP appeared to be satisfied that the IP present its perspective on the complaint and, by implication, that would appear to include a concession that adequate consents were obtained as are required by the Code. Going further the SP does not appear to have taken adequate steps to address issues raised in previous adjudication reports which I have mentioned above.

Accordingly, the SP is fined R20 000, which is payable on demand by the WASPA Secretariat.

In mitigation, the IP responded to the complaint and took some steps to add the complainant to its internal DNC lists and unsubscribe him from certain of its databases. I am not satisfied that the IP took the steps required by the Code to address previous complaints highlighting similar issues, though, and this is an aggravating factor.

Accordingly, the IP is fined R20 000, which is payable on demand by the WASPA Secretariat.

Subject: [WASPA.complaints] FW: Additional Information: Complaint Ref###17872 Escalation of unsubscribe #3230703
From: Wickus du Plessis <Wickus.duPlessis@Cellfind.co.za>
Date: 2012/08/24 05:13 PM
To: "complaints@waspa.org.za" <complaints@waspa.org.za>

Dear WASPA,

Please find attached response from form Blue Label Data Solutions in response to complaint #17872.

Kind Regards,

1. Blue Label provides multiple services to an array of clients across all industries and we ensure that every potential client is aware of the WASPA code and its provisions by means of contractual agreement or encouragement that clients become WASPA members.
2. There is a clear misinterpretation with the explanation that "there are various ways to obtain consumer data". Although it is noted that the complainant consider this as "a clear admission of flagrant disregard for WASPA regulations", it has to be clearly understood that obtaining data from any source is not of a breach of any WASPA proviso. Further, there was no confirmation that the complainants details were obtained from a specific source since the confirmation of the source was not known at the time and remain unknown to date.
3. As a member of WASPA it is a priority for Blue Labe Data Solutions to comply with its Code of Conduct and its complaint procedure at any level. The allegation by the complainant that Blue Label Data Solutions intentions to influence the complaint procedure is without any foundation.
4. The complaint continues: "Even if an adjudicator finds them [Blue Label Data Solutions] more truthful than I do, It would at least have been placed it on the record that Blue Label acknowledges that they can't hide behind DMA membership when sending SPAM.";

It is already on the record that Blue Label Data Solutions is a proud member of the Direct Marketing Association and its ongoing endeavours to prevent SPAM;

- a. It is not a requirement from WASPA to submit any potential recipient against the Direct Marketing Associations 's DNC database to determine if the subscribe has an opt out status or not but simply an additional option available to any WASPs or its clients to safeguard against or attempt to prevent SPAM;
- b. It must also be noted that with the absence of the implementation Section 11(3) of the CPA, no proactive interim solution is provided by WAPSA.

The complainant's allegations against the Direct Marketing Association have no relation to Blue Label Data Solutions and his comments were therefore conveyed directly to the DMA.

5. Notwithstanding point 3 and 4, we clearly indicated in our preceding response:
 - a. that the source of the message received by the complainant was in fact a client of Blue Label Data Solutions using its platform and further;
 - b. we clearly indicated that an urgent request was lodged to our client for proof of subscription and/or proof of a commercial relationship with the complainant.

To date, no response was forthcoming from the client but any subsequent response received after the date of this correspondence will be submitted immediately.

6. Although the references against Blue Label Data Solution are inaccurate and speculative at best, we concur with the complainant that the current WASPA system of identifying and preventing the transmission of SPAM has been unsuccessful and until such time that a single compulsory DNC register is recognised or implemented by WAPSA it would be impossible to fairly enforce any WASPA SPAM provision for the 250 databases of WASPA members or the thousands additional databases of its clients or third party company with direct access to its services.

To echo the complainant's frustration, it is impossible to opt out from all of these databases at once

and although it is possible to single out a specific member it will NOT prevent the complainant from receiving any further SPAM.

7. Blue Label Data Solutions added the complainant's details to its DNC database although it was never listed as a recipient in the first place. This will not in any way prevent any of its clients using its own database from transmitting messages that may be considered as SPAM through its current service provider or any other channel linked to the WASPA members, affiliates or thousands of clients.

WASPA members attempt to enforce compliance to the WASPA code of conduct through contractual agreements with its client. Although the members remain responsible for all submissions by third parties, it must be noted that these submissions are received in good faith and with the assumption that it does comply.

8. In conclusion, WASPAs response to SPAM based on a report or complaint by a subscriber is relatively simple due to its reactive nature. In this case both the Service Provider and the Information provider both allowed the transmission of SPAM to the complainant by a third party. Although the service provider involved endeavour to enforce the WASPA restrictions on SPAM, unless it already registered the subscriber on its own DNC database it will not prevent the transmission of SPAM by any other party with access to its service. Unfortunately this also applies to Blue Label Data Solutions.

The WASPA member is dependent on the third party compliance but it remains responsible for any breach. As referred to in point 7, taking responsibly of a breach will however in no way whatsoever prevent a subscriber from receiving any further SPAM from other providers.

Blue Label Data Solutions will welcome any suggestions from WASPA on how to proactively identify SPAM or prevent the transmission thereof from any third party or client with access to its services.

To reiterate, as a solution to this complaint and SPAM in general we recommend that WASPA implement/recognise a compulsory national DNC register that may be implemented on both WASP and Network levels in order to proactively block any transmission of content to a registered subscriber and thereby preventing SPAM. This will ensure that that it will be impossible for any WASP, SP, IP or any other organisation from successfully transmitting or delivering any content to that subscriber.

Wickus du Plessis
Operation Manager - Finance & Legal



Mobile: 083 327 7744
Phone: 011 848 8216
Fax: 086 550 7834
Email: Wickus.duPlessis@Cellfind.co.za