

Adjudicator's report

Complaint reference number: #18228

WASPA member(s): Blue Label Data Solutions (Proprietary) Limited ("the IP") and iTouch Messaging Services ("the SP")

Membership number(s): 1234 and 0121, respectively

Complainant: Public

Type of complaint: Unsubscription from unsolicited sms's

Date complaint was lodged: 2012-08-20

Date of the alleged offence: 2012-08-16

Relevant version of the Code: 12.1

Clauses considered: 5.1 and 5.2

Relevant version of the Ad. Rules: Not applicable

Clauses considered: Not applicable

Related cases considered: No additional cases considered

Complaint

The complainant is a member of the public who filed the following complaint on 2012-08-26:

Received a unsolicited commercial message this AM from an unknown source for an unknown IP.

Therefore to my knowledge I have no prior interaction or relationship with either the member or the IP and consider this message SPAM. message reads: Get a hospital cash plan for your whole family from R42.46pm. NO MEDICALS NEEDED + MATERNITY BENEFIT. Reply Yes for more info. STD RATES. SMS STOP to optout. as the long code from which this message comes form is not listed on the smscode.co.za website, I was forced to reply YES to the message in order to find any type of identifying information in regards to who sent this

message. the reply i received reads: Thank you for applying for a Hospital Cash Plan from ThinkMoney. Expect a call from Chartis shortly. I also find that the format used to abbreviate 'per month ' in the message 'pm ' is misleading and intentionally formatted in a manner that is not as clear as I believe it should be. Again I have never interacted with either of these entities and they together with the member which facility was used, are therefore in breach of above listed clauses. I required proof of how they got a hold of my cell number as well as when i provided consent to be marketing to in this manner.

The SP unsubscribed the complainant from its service on the same day but this did not satisfy the complainant. The complainant subsequently escalated the complaint for the following reasons:

Good day, My request has still not fully been addressed as no proof has been supplied. Please also note a further SMS was received from the same company on the morning of 17 August. Regards [name redacted]

Service provider's response

The SP investigated the messages that formed the basis of the complaint and appear, from a series of correspondence between various parties between 31 August 2012 and 3 September 2012, that IP was responsible for at least one message to the complainant. The IP's Operation Manager responsible for Finance and Legal, Wickus du Plessis, replied to WASPA on 4 September 2012 with the following:

Referring to the above matter and my email addressed to you on 29 August 2012 the following:

It was clearly communicated to the subscriber that the source of her personal data was Data Direct 24. Since this entity is no longer in existence we are unable to provide you with any further details of subscription and/or commercial relationship. The data used for this campaign was accepted in good faith with the understanding that a clear commercial relationship exit between the client and the subscriber and would therefore be compliant with WASPA provisions. A full audit is underway.

The subsequent messages received by the subscriber on the 14th and 16th August were transmitted by a different WASP but as a direct result of subscribers 'Opt In' instructions received in reply to the initial message which, regardless of the subscribers intentions constitutes explicit request/permission for additional communication from the client. Clear opt out instructions were listed in all communications with the subscriber.

Although it is conceded that the incorrect abbreviation was used in the initial message, we strongly disagree with the subscribers allegation that this was intentional or in any way misleading. This comments regarding the formatting of the contents of the message was noted and will be communicated to the client.

Du Plessis also enclosed an email he sent to the complainant on 29 August 2012 with the following explanation:

Referring to the above complaint and in order to expedite resolving the matter I am assisting Interactive Telephony in its investigation.

Accordingly, I have establish that your information was obtained from a company called Data Direct 24. Following the acquisition into our group of companies all data were also incorporated.

I am currently investigating what the relation was with Data Direct 24 and any of its clients in order to determine both the original source of your information and to establish the basis or commercial relationship as reason for including your personal information at the time. It is a challenging situation since the original entity is no longer in existence but I will nevertheless endeavour to get to the bottom of this and to find an expectable answer.

I have however in the interim submitted your data to all Blue Label Telecoms Ltd subsidiaries to be included on all exclusion directories that will prevent any further commercial contact.

My sincere apologies for the delay or any inconvenience caused. I appreciate you understating and invite you to contact me directly at any time.

The complainant was not satisfied with the IP's explanation and advised WASPA as follows:

Good day,

I am not satisfied with the response I have received to date as I have still not been supplied with proof of where the SP/IP has obtained my number from.

Please provide proof as previously requested.

In response, Du Plessis advised WASPA that "in both cases the source of the complainants data/information as provided to Interactive Telephony was clearly identified as Data Direct 24". He further

advised that he was “currently engaging with the different parties to obtain further information relating to the source of [the complaint’s] detail and [would] revert shortly”.

The complainant was apparently still not satisfied and Du Plessis advised WASPA on 22 October 2012 that he had, by that point, not successfully obtained a response to his enquiries and, in the absence of a response, “it would be impossible to provide proof of subscription and/or any consent that may exist or have existed”. He pointed out that resolving the complaint depended on “information that can only be provided by Data Direct 24 and [he] would therefore proceed until [he does] receive a satisfactory response”. He requested a further time extension until 26 October to investigate further.

It appears the IP did not follow-up and the complainant asked that the complaint be submitted for adjudication on 21 November 2012.

Sections of the Code Considered

Clause 5 of the Code deals with “Commercial and bulk messages”. Clause 5.1 is titled “Sending of commercial messages”. The pertinent subsections of clause 5.1.1 state the following:

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.

5.1.6. ...

5.1.7. ...

5.1.8. ...

5.1.9. 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.

5.1.10. ...

5.1.11. 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.

5.1.12. Direct marketing messages may not be sent on Sundays, public holidays, on Saturdays before 09:00 or after 13:00, or on all other days between 20:00 and 08:00, unless expressly agreed to in writing by the recipient.

Two relevant definitions are –

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.)

and

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.

Clause 5.2 of the Code is titled “Identification of spam” and it states the following:

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.

Finally, clause 5.3 is titled "Prevention of spam" and provides 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.

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

Decision

The IP has two challenges in this complaint. The first relates to the message that was sent to the complainant and the second relates to the underlying consent for the message.

The message reportedly read as follows:

Get a hospital cash plan for your whole family from R42.46pm. NO MEDICALS NEEDED + MATERNITY BENEFIT. Reply Yes for more info. STD RATES. SMS STOP to optout

The central problem with the message seems to lie in clause 5.1.11's requirement that the message originator "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." The highlighted portion of this clause is the primary reason why this message is problematic and also touches on the second challenge.

Although the IP was able to identify the organisation which was the source of the complainant's personal information, it was unable to prove the complainant's consent to use the complainant's personal information for the message. The IP focused on the second aspect of clause 5.2, namely a "prior commercial relationship", as the basis for the message. Specifically, the IP suggested that the complainant's prior commercial relationship was with Data Direct 24 and when the IP acquired it, Data Direct 24's data was passed to the IP.

It is not clear whether the complainant had a "reasonable opportunity" to object to her personal information being used to send her "direct marketing communications" "at the time when the information was collected" but she does appear to have been afforded a "reasonable opportunity" to object on the occasion she received the message which gave rise to this complaint. Unfortunately the IP is not able to satisfy clause 5.1.11's requirement and this casts a doubt over the initial consent which ought to have been given in order to enable the IP to make use of the complainant's personal information to send her this particular message.

Du Plessis contended, in his email to WASPA dated 4 September, that the complainant's apparent consent to receive further messages from the SP was indicative of her similar "explicit request/permission for additional communication from the client" but this inference is insufficient. Clause 5.1.11 focuses on the data Data Direct 24 presumably supplied to the IP and the "explicit consent" to do so. Inferred consent based on an opt-in to receive messages from another provider is not sufficient.

In the absence of some proof that the complainant was, in fact, in a "prior commercial relationship" with Data Direct 24 or had given the requisite consent that empowered the IP to use her personal information in the manner targeted in this complaint, the IP is simply unable to demonstrate the complainant's "explicit consent" and is in breach of clause 5.1.11.

Sanctions

In the circumstances the IP is directed to remove the complainant's personal information from its database, to the extent it has not already done so, as if the complainant had made use of a facility contemplated by clause 5.1.2 of the Code.