



REPORT OF THE ADJUDICATOR

Complaint reference number	: 19043
WASPA member(s)	: Cellfind
Membership number(s)	: 0019
Complainant	: Consumer Complaint
Type of complaint	: Breach of Code of Conduct
Date complaint was lodged	: 2012-11-16
Date of the alleged offence	: 2012-11-15
Relevant version of the Code and Laws considered	: Version 12.4 and Electronic Communication Transaction Act, Act 25 of 2002 and Consumer Protection Act , Act 68 of 2008
Clauses considered	: 3.1.2 , 5.1.11 , 5.2 and 5.3
Relevant version of the Ad. Rules	:
Related cases considered	: 18757 , 18971, 10854, 17872 and 16761

Complaint:

Complaint 19043 was logged by a consumer claiming that it had been automatically added to a mailing list and been sent unsolicited mail or spam. The Complainant had also requested in terms of Section 45 of the Electronic Communication Transaction Act, Act 25 of 2002 (hereafter referred to as ECT) and Section 11 of the Consumer Protection Act, Act 68 of 2008 (hereafter referred to as CPA) requested to be removed from the mailing list and that the SP disclose where it had obtained the complainant's personal cell-phone number in terms of Section 3.1.2, 5.1.11, 5.2 and Section 5.3 of the WASPA Code and Section 45 of the ECT.

The complaint progressed as follows:

- Complaint 19043 was logged by a consumer regarding breaches of Section 3.1.2 pertaining to the contravention of Section 45 (1) of the Electronic Communication Transaction Act, Act 25 of 2008 as well as Section 11 of the CPA as well as Section 5.1.11, 5.2 and 5.3 of the WASPA code as on the 15th November 2012
- The formal complaint was sent to the SP on and they responded on 2013-02-18.
- The WASP requested on 2013-02-21 to provide the complaint with the information sought by the Complaint but. On the 2013-03-20 WASPA expedited the matter for adjudication.

WASP response:

SP responded that it had removed the complainant from its system but that the number was blocked on their side hence no confirmation e-mail could be sent to complaint that number had been removed. SP failed to disclose where it had obtained complaints.

Decision:

The issues here is whether the WASPA Code was breached, in particular section 3.1.2. and Section 5.1.11 as well as 5.2 and 5.3 as well as the relevant section of the CPA and ECT.

In terms of Section of the WASPA Code 3.1.2. , “ Members are committed to lawful conduct at all times” which includes obeying the ECT and CPA Acts sections regulating SPAM / unsolicited mail .

Additional in terms of 5.1.11. of the WASPA code

“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.”

Also Section 5.2 states that ,

“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.

In addition in terms of Section 5.3. of the WASPA Code an SP must prevention sending 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. "

The CPA further states in section 11, subsection (2) that,

"a person who has been approached for the purpose of direct marketing may demandthat the person responsible for initiating the communication desist from initiating any further communication"

Lastly , the ECT in Section 45 sates the following,

"45. (1) Any person who sends unsolicited commercial communications to consumers, must provide the consumer (a) with the option to cancel his or her subscription to the mailing list of that (b) with the identifying particulars of the source from which that person obtained on request of the consumer

(3) Any person who fails to comply with or contravenes subsection (1) is guilty of an offence and liable, on conviction, to the penalties prescribed in section 89(1).

(4) Any person who sends unsolicited commercial communications to a person who person has advised the sender that such communications are unwelcome, is guilty of an offence and liable, on conviction to the penalties prescribed in section 89(1)."

The SP was requested on 2013-02-21 to provide the complaint with the information sought by the Complaint but it failed to disclose such information as required by the Code and relevant legislation.

I am satisfied that Section 3.1.2, 5.1.11 , 5.2 and Section 5.3 of the WASPA Code and Section 45 of the ECT and Section 11 of the CPA have been contravened..

The only issue I am not prepared to Rule in the complainants favour on is the fact that the SP tried to send the complainant an SMS to confirm the unsubscripion - but was blocked from doing so. No evidence before me suggest anything to the contrary .

Sanction :

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

The prior record of the SP of repeat transgression as per WASPA decision 18757, 18971 and 17872 with regard to breaches of the relevant sections of the Code of Conduct and also the relevant Sections of the ECT and CPA must be aggravating factors and its failure to appropriately reply to complainant request for information pertaining as to where the SP had obtained its number as required by Law is an additional aggravating factor.

Taken the above into consideration consequently the Adjudicator orders:

- A Fine of R 20000.00 for repeat sending spam / unsolicited mail in contravention of the WASPA 3.1.2 , 5.1.11 , 5.2 and 5.3 of the WASPA code;
- The WASPA Secretariat is also ordered to instruct the WASPA Monitor to ensure that the SP is indeed complying with this and to take appropriate disciplinary steps if this order has not been complied with. If repeat offences take place that the matter be referred to the relevant authorities for criminal prosecution or other form of administrative action in terms of the remedies by law in terms Section 45 of the ECT and Section 11 of the CPA
- That the SP be suspended for 3 months (such suspension to be suspended for a period 6 months in which the Service provider should not be found guilty of the same transgression) as this is a serial repeat transgression.