

REPORT OF THE ADJUDICATOR

WASPA member(s):	Connet IT Systems (SP)
Membership number(s):	#1036
Complainant:	Competitor
Type of complaint:	Unsolicited Communication (SMS)
Date formal complaint was lodged:	2013-05-27
Date of the alleged offence:	2012-04-15
Relevant version of the Code:	12.1
Clauses considered:	5.1, 5.2 and 5.3, 3.9.2, 3.9.3 and 3.9.4
Relevant version of the Ad. Rules:	Not Applicable
Clauses considered:	Not Applicable

Complaint

The complaint is the escalation of a formal complaint.

The complainant is a competitor who filed a complaint against the SP pertaining to an unsolicited commercial message received by the complainant on 2013-04-15 that read as follows:

“Unlimited visits to private GP and medication for only R279 per month! Sms A for a call, B for info or go to www.affinityhealth.co.za. C to opt out”

The complainant asserted that the message constituted “spam”.

In asserting a breach of the WASPA Code of Conduct, the complainant referred to clause 5.3.1 which provides that:

- 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.

Informal Complaint Notification

The WASPA Secretariat in its discretion opted to make use of the informal complaint procedure to process the complaint received.

The Secretariat forwarded the complaint to the SP concerned on 2013-05-03 notifying the member of the five working days permitted to effect an appropriate remedy as well as providing for further notices in accordance with the informal complaint procedure and 14.2 of the Code.

Service Provider's Response

The SP responded on 2013-05-09 confirming receipt of the notification of the complaint and noted that it had been in touch with the complainant and are working towards a resolution to the complaint. Furthermore, the SP provided that it would duly inform the Secretariat once the complaint was resolved.

Formal Complaint Notification

In accordance with 14.2.5 of the Code, the formal complaint was sent to the SP on 2013-05-28. The notification provided that "according to the complainant, this complaint was not satisfactorily resolved using the informal complaint procedure." The complainant specifically noted that despite communications from the SP and the SP's client to prevent future direct marketing to the complainant, the issue of the request for details on where the complainant's contact information had been obtained was not satisfactorily dealt with. The complainant made reference to the SP's services as described on the SP's website but those references and the validity of the contentions are specifically excluded from this report for falling outside the scope of this adjudication.

Notice of the SP's duties associated with the relevant formal complaint procedures and a request for further information relevant to the complaint were included in the notification of the formal complaint. The notification specifically provided five working days to respond to the complaint and provide any information that SP deems relevant to the complaint.

SP's Response to Formal Complaint

The SP responded to the formal complaint on 2013-05-31 asserting as follows:

- *That the SP had been engaged in attempting to "trace the interaction" associated with the complaint which was a time consuming process due to the reliance on the company that had send the message to provide the relevant information.*
- *That the SP believed there to be "malicious intent" associated with the complaint due to:*
 - *The complainant being employed by a competitor to the SP;*

- *Despite receipt of direct marketing messages in the past, the complainant has only laid a complaint against the SP*
- *Both the SP's representative (the writer of the email) and the company that sent the message in question had been in touch with the complainant to explain the time necessary to trace the interaction.*
- *Despite the contact details of the SP's representative and the third company being made available to the complainant the complainant had opted to escalate the complaint to a formal complaint.*
- *That the complainant was "abusing the WASPA complaint procedure" as the SP believed that it had done everything in its power to resolve the issue, including blacklisting the number on the SP's system and the third company's system.*

The SP noted that it awaited the Secretariat's response and would continue to work towards resolution of the issue.

The Secretariat forwarded the SP's response to the formal complaint to the complainant on 2013-09-17 requesting an indication of whether the SP's response has been an adequate resolution to the complaint. The complainant refused resolution on 2013-07-09 asserting that the complaint had not been resolved to the complainant's satisfaction. The complainant further noted dissatisfaction with the delay in the adjudication of this complaint particularly that the SP had responded to the notification of the formal complaint "four months ago" and that no further action had been taken by the WASPA Secretariat since. The Secretariat notified the SP on 2013-09-17 that the complainant refused resolution and that the matter would proceed to adjudication. Furthermore the SP was requested to provide additional information relevant to the complaint to the Secretariat within 5 working days.

The SP responded on 2013-09-23 to affirm that the SP:

- On receipt of the complaint immediately blacklisted the number on the SP's systems;
- The SP's (client) company that had sent the message contacted the complainant and agreed to provide the source of the complainant's data and explained that the provision of such information "may take some time".
- Prior to receipt of such information the complainant had proceeded to escalate the informal complain which left the SP with no option but to await the adjudication.

Sections of the WASPA Code of Conduct Considered

Clause 5.2 pertains to the identification of spam. Notably, section 5.2.1 provides as follows:

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.

Clause 5.3 pertains to the prevention of spam. Notably, 5.3.1 and 5.3.2 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.

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 5.1.11, 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.

3.9.4. A WASPA member shall, by obtaining the information provider's signature on the WASPA

template agreement, be deemed to have taken all reasonable steps to ensure that the information provider is fully aware of the terms of the WASPA Code of Conduct and this shall be considered as a mitigating factor for the WASPA member when determining the extent of any possible liability for the breach of the provisions of the WASPA Code of Conduct as a result of any act or omission by the information provider.

Decision

Taking account of the content of the various correspondences exchanged during the informal and formal complaint processes, and the relevant sections of the Code, the SP has not resolved:

- The complainant's contention that the message sent to the complainant was spam.

Referring to clause 5.2.1 the SP in responding to the complaint, needed to satisfy the complainant that:

- (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 the absence of any proof that evidences that 5.2.1 (a) (b) or (c) the SP has not delivered any material consideration to indicate that the message was not in fact spam.

The SP has taken steps to prevent further transmission of spam to the recipient but this does not detract from the absence of proof to negate the distribution of spam.

The SP has not tendered any proof of the reasonable measures deployed to ensure that their facilities are not used by the client to send spam.

Hence, I find the SP is in breach of 5.3.1 of the Code.

It is unclear as to whether the SP has in place expeditious methods in its dealings with its clients to respond to the requests for explanations as requested by the complainant, as required by 5.3.2 of the Code. The SP's contention that there was insufficient time to adequately respond to the complaint through the tracing of the interaction by the SP's client prior to escalation to a formal complaint refers to the period between 2013-05-03 and 2013-05-28 when the formal complaint was lodged. The SP was then

afforded in accordance with the notification of the formal complaint an additional five working days to provide the Secretariat with any information that the SP deemed relevant to the complaint.

Regarding the SP's contention of malicious intent by the complainant, the complainant appears, prima facie, to have acted in accordance with the available WASPA procedures and the complaint is in reference to conduct specified by the Code. Hence this contention is not pursued further in this decision.

Sanctions

In the circumstances, the SP is fined R2,500.

The SP is strongly encouraged to carry forward the requirements of 5.3. in its dealings with clients, in particular:

- (i) the deployment of reasonable measures to prevent the distribution of spam; and
- (ii) the deployment of expeditious methods to procure information from the SP's client(s) when responding to a complaint,

to avoid more stringent sanctions at a later date.