



REPORT OF THE ADJUDICATOR

Complaint reference number:	23479
WASPA member(s):	Resolve Partners Solution (IP) (1411) / Cellfind (Pty) Ltd (SP) (0019)
Membership number(s):	See above
Complainant:	Public
Type of complaint:	Spam
Date complaint was lodged:	2014-02-17
Date of the alleged offence:	
Relevant version of the Code:	12.4
Clauses considered:	5.1, 5.2 and 5.3
Relevant version of the Ad. Rules:	N/A
Related cases considered:	N/A

Complaint 23479 is the escalation of informal complaint regarding unsolicited sms's and no stop service.

The informal complaint was sent to the WASP on 2014-02-19 and the SP requested handover on the 2014-02-20.

The WASP replied on the 2014-02-25 to WASPA and complainant.

Complainant emailed WASPA concerning handover on the 2014-02-25 and the WASPA secretariat responded on the 2014-02-26.

The WASP and complainant corresponded between each other on the 2014-02-26, several times concerning the informal complaint.

The informal complaint was escalated to a formal complaint on the 2014-02-27.

The WASP replied on the 2014-02-27.

The complainant refused resolution on 2014-02-27.

Complaint

The complainant complained about receiving bulk messages from SANRAL.

He stated:

"I submit this complaint in the interests of the public at large, as a public service. This complaint is directed at the South African National Roads Agency Limited (SANRAL) and Electronic Toll Collection (ETC) and the associated Violations Processing Center. It is evident, from having seen numerous sms messages sent to friends and associates, that SANRAL is soliciting payment of e-toll accounts. None of the messages I have witnessed offers a \"STOP\" option allowing the recipient to \"Opt out\" from receiving these sms messages. "

He stated further that:

"The South African National Roads Agency Limited And National Roads Act, 1998 (ACT No. 7 of 1998) : E-ROAD REGULATIONS

6. Terms and conditions for payment of toll

(5) If an alternate user does not pay the toll contemplated in terms of sub-regulation (4) within the time and at the place

and subject to the conditions that the Agency may make known and determine, the Agency must within 32 days after the alternate

user has used an e-road but after expiry of the grace period and unless the user has registered, send an invoice to the the

said user, to the last known address provided in terms of the National Road Traffic Act by such user, reflecting the amount of

the toll payable and such invoice shall be paid by the said user on or before the date reflected on the invoice.

(6) The Agency may follow criminal and civil process to collect all outstanding tolls if, despite and invoice having been

sent, the user continues to fail to pay such outstanding tolls within the period stipulated in the invoice or at all.

The content of these sms messages does not indicate that it is an invoice, it also does not itemise the amount due (with

appropriate reference numbers) nor does it indicate a date by which the stated amount is to be paid. It is NOT an invoice.

Please note the following report in iafrica.com, dated 8 January, 2014 : Sanral clarifies sms billing -

"On text messages sent to motorists

Sanral said text messages and e-mails did not replace invoices, and said they were part of normal debt collection in everyday business practices.

The agency also said these were being sent out to afford the road user the opportunity to qualify for the relevant discounts

if they settle the amounts within certain time periods. The possibility exists that a motorist can receive an invoice well

after the period that would have entitled him/her to qualify for a discount."

The link to the article is:-

<http://business.iafrica.com/news/892989.html>

It is obvious from the above that the sms serves, at best, a reminder that a user has incurred a toll fee. This is a SERVICE

while also soliciting payment PRIOR to and not part of the the legislated invoice process that binds SANRAL.

It is also not part of "... normal debt collection in everyday business practises" as claimed by SANRAL - the debt

collection process starts with "... an invoice to the the said user, to the last known address provided in terms of the National Road Traffic Act by such user, reflecting the amount of the toll payable and such invoice shall be paid by the said user on or before the date reflected on the invoice." as required by the regulations binding SANRAL. Bearing in mind the number of times motorists will pass through the numerous e-toll gantries and the resultant roliferation of "reminders" it is my contention that these smss messages are "commercial" in nature, constitute spam, harassment and an invasion of a privacy that user's are entitled to on their cellular phones. These messages are NOT part of the debt collection process (civil process or payment on receipt of invoice) referred to in the Act. Therefore SANRAL should be required to include a "Stop" option to allow recipients to decide for themselves if they need "reminders" or not."

WASP Response

The IP responded stating that as these messages were of the nature of debt collection, they did not fall within the ambit of the "commercial message" required for them to be considered spam.

The Complainant's Further Response

The Complainant went further to question the veracity of the messages being classified as debt collection messages on the basis of references to SANRAL, debt collection and E-tolling regulations and legislation.

The SP's Response

Numerous correspondence was then entered into between the Complainant and the Service Provider which I will not repeat as all parties have copies thereof and the gist is summarised in the following response.

The Service Provider then responded to state that:

As the full communication between us and the complainant is part of this mail, I will try not to repeat too much, but here is our opinion:

- The complaint started as a complaint against "Commercial Solicitation" which was compared to "Marketing" which is addressed in the WASPA code of conduct.
 - o ETC Responded with their official stance where they disagree, letter attached.
 - o We agree with them due to the simple fact that, a reminder of money being owed for a service already rendered cannot be classified as Marketing in our opinion.
- The complaint then took a turn as to whether ETC is a registered Debt Collector or not and that query was based on (according to the complainant himself) assumptions that he made on which he may stand to be corrected on.
 - o Resolve Solution Partners are not in a position to respond to the second query, and we cannot see how that can be a WASPA responsibility either (here I might stand corrected)
 - o Our opinion again is that for collecting money that is being owed to a company, the company need not be a registered Debt Collector, that is part of any business's normal business processes.

Due to these differences all attempts to settle informally has failed and WASPA will have to adjudicate please. ETC shared the knowledge with us that SABC also went through this same process for TV License payment reminders, which according to us is similar and the case was settled in their favor.

I hope you find this response having enough information as to make a decision. Please feel free to contact me if you need further information.

Complainant's Final Response

On receipt of the SP's response the Complainant then raised concerns about breaches of privacy and the personal information held by various entities related to SANRAL.

Sections of the Code considered

5. Commercial and bulk messages

5.1. Sending of commercial messages

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. Non-commercial bulk SMS services (such as newsletters) must have a functional opt-out procedure consistent with that described in clause 5.1.3.

5.1.7. Notwithstanding clauses 5.1.3 and 5.1.6, members are not obliged to honour an opt out request for communications that are necessary for the conclusion or performance of a contract to which the recipient is a party.

5.1.8. Notwithstanding clauses 5.1.3 and 5.1.6, members are not obliged to honour an opt out request for communications required by law.

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. Where the words "END", "CANCEL", "UNSUBSCRIBE" or "QUIT" are used in place of "STOP" in an opt-out request, the service provider must honour the opt-out request as if the word "STOP" had been used.

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.

5.2. Identification of spam

5.2.1. Any direct marketing message is considered unsolicited (and hence spam) unless:

the recipient has requested the message;
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;
at the time when the information was collected; and
on the occasion of each communication with the recipient; or
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

WASPA is not the correct forum to adjudicate on this issue as it relates to facts which would first have to be established at an alternate forum prior to WASPA being able to rule on any breaches of the Code. The issue of whether or not these commercial messages are debt collection messages or not cannot be adjudicated by WASPA. This will need to be taken up at an alternate forum and once a ruling received as to the nature of the messages a complaint can be laid.

With regards to the concerns about personal information held by third parties and what they may or may not do with this information, once again WASPA has no authority to adjudicate or rule or even investigate this matter.

I cannot provide legal advice to the Complainant s to the correct path to take but suggest that he approaches an attorney to assist in this regard.

Sanctions

No sanction. Complaint dismissed.