

REPORT OF THE ADJUDICATOR

WASPA Member (SP): Altech Autopage Cellular

Information Provider (IP):
(if applicable)

Service Type: Bulk Messaging

Complainant: Consumer

Complaint Number: 2392

Code version: Code v5.3 and Ad Rules v1.6

Complaint

1. On the 4th of October 2007 the Complainant lodged a complaint via the WASPA website in the following terms:

Affiliations: I am not employed by, or otherwise associated with one of WASPA's Member companies

Affiliation_Information:

Name_WASP: AutopageCellular

OtherID: +278393001420001

Code_Breached: 5.2.1

Detailed_Description_Complaint: Autopage sent me an unsolicited SMS advertising a Samsung D900i. They also called me on my office number trying to sell me a contract as well implying that they bought my contact details from somewhere. I am not a client of theirs and don't wish to be. I don't see why I should have to pay the cost of an SMS to "opt out" of some nonsense that I never opted in for.

Tick_as_appropriate: I have not contacted the service provider and believe this matter requires WASPA's attention

Declaration_Good_Faith: Information provided is true and correct and provided in good faith

2. The complaint was dealt with by the WASPA Secretariat along with complaints 1743, 1986 and 2090.

Investigation

3. On the 9th of October 2007 the Member contacted the WASPA Secretariat by e-mail and advised that the Complainant had been contacted and removed from the

distribution list. It is apparent from the context that the Member contacted the Complainant.

4. This communication was forwarded to the Complainant on the same day, and on the 10th of October 2007 the Complainant responded by e-mail, confirming that he had been contacted but that whoever contacted him was not able to advise him how they had come upon his cellphone number other than to say that it was contained in their "national database". The Complainant advised that until that information was provided to him he did not consider the complaint resolved.
5. On the 19th of October 2007 the Member sent an e-mail to the WASPA Secretariat enclosing responses by Blue World Agencies CC t/a SMSPortal ("SMSPortal") to various complaints, including this one. The response by SMSPortal to this complaint was similar to the response given to complaints 1743, 1986 and 2090:
 - 5.1. This response set out the technical measures put in place by SMSPortal to allow for users to unsubscribe from their services. The upshot of these measures is that incoming replies containing the words "stop", "delete", "remove", and "unsubscribe" are noted, and the corresponding user's mobile number is removed from the relevant mailing list. The IP also has a global "blacklist" of numbers that SMSs are not to be sent to under any circumstances.
 - 5.2. A point raised by SMSPortal only in respect of this complaint was that the cost of a reply is at the standard SMS rate – there is apparently no extra charge levied for unsubscribing.
 - 5.3. The IP advised that the Complainant had "...a 'relationship' (store card, cellphone account or opted into a mailing list)..." with their client.
 - 5.4. The IP assured further that the Complainant would receive no further SMSs from it.
6. On the 27th of October 2007 the Complainant e-mailed WASPA and advised that he did not accept the explanation given by SMSPortal in that he has no relationship with SMSPortal or the Member and the best projects contention made by SMSPortal that such a relationship exists. He further advised that he never "opt in" to mailing lists and that he does not have an order paid account or a store card. The best requested that the following questions be answered:
 - 6.1. the account number and account holder's name for the Member's account allegedly linked with the Complainant.
 - 6.2. The store card number and details in respect of which a relationship with the Complainant is claimed.
 - 6.3. Details of any mailing list to which the Complainant may have opted into.
7. On the 30th of October 2007 SMSPortal e-mailed the WASPA Secretariat and advised that the originating number is not assigned to them and that was apparently used by the Member.

8. On the 12th of November 2007 the WASPA Secretariat sent an e-mail to the Member advising it that as WASPA had received no response from the Member regarding the complaint, it was obliged to pass the matter on to an independent adjudicator for review without the benefit of the Member's response.
9. Finally, on the 20th of November 2007 the Member e-mailed the WASPA Secretariat and advised that SMSPortal had given a guarantee that no further answers that SMSs would be sent to the Complainant's number.

Portion of the Code Considered

10. While no clauses of the WASPA Code of Conduct are cited in the complaint, it is trite that Members of the public cannot be expected to quote chapter and verse of the Code of Conduct. The adjudicator is thus competent to decide what aspects of the code are likely to have been infringed in any particular complaint.
11. This matter revolves around the sending of unsolicited commercial emails as set out in clause 5 of the WASPA Code of Conduct:

5. Commercial communications

5.1. Sending of commercial communications

- 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 database, so as not to receive any further messages from that message originator.
- 5.1.3. Any mechanism for allowing a recipient to remove him or herself from a database must not cost more than one rand.
- 5.1.4. Notwithstanding 5.1.3, for SMS and MMS communications:
 - (a) 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 must be included at the start of any messaging service, for example: "reply STOP to opt out".
 - (b) Recipients of premium rate or non-replyable messages must have the option to opt out at a cost of R1 or less. This opt-out instruction must be included in every commercial premium rate or non-replyable message, for example. "sms STOP to 32xxx to opt out".
- 5.1.5. Upon request of the recipient, the message originator must, within a reasonable period of time, identify the source from which the recipient's personal information was obtained.
- 5.1.6. Commercial communications may not be timed to be delivered between 20:00 and 06:00, unless explicitly agreed to by the recipient, or unless delivery during this period forms part of the upfront description of the service.

5.2. Identification of spam

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

- (a) the recipient has requested the message;
- (b) the message recipient has a direct and recent prior commercial relationship with the message originator and would reasonably expect to receive marketing communications from the originator; 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. 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.

12. On examination of the facts, the clauses of particular concern in this matter appear to be:

12.1. **5.1.5** in that the source where the IP obtained the Complainant's personal information from may not have been adequately identified, and

12.2. **5.3.1** in that the commercial messages in question may have amounted to spam.

Decision

13. Firstly it is at apparent that the Member requested SMSPortal to respond to a batch of complaints, which it did without applying its mind adequately. This is demonstrated by SMSPortal's belated advises that the originating number was not assigned to it and that it was hence not a party to this complaint. While its lack of application raises a critical eyebrow, it is probable that SMSPortal is not involved in this complaint.

14. The fact that the Member did not realise SMSPortal was not involved also raises further questions about the efficiency of the Member's system for handling complaints, which issue has been dealt with in complaint 1743.

15. **Clause 5.1.5:** the Complainant made a verbal request to the Member for disclosure as to where the Member obtained the Complainant's personal information, but was merely told that it was in the national database.

16. The Complainant repeated his demand for disclosure his e-mail of the 10th of October 2007, the contents of which were certainly forwarded to the Member. No relevant response was forthcoming. I accordingly find that the Member has breached this clause.
17. **Clause 5.3.1:** as set out above, clause 5.2.1 defines spam as any commercial communication where the recipient has not requested such a communication, does not have a "direct and recent prior commercial relationship" with the message originator or where the recipient's contact information has not been supplied to the message originator with the recipient's consent.
18. It does not appear from the facts that any of these three grounds have been established. The Complainant's version is certainly that he did not opt into the receipt of e-mails under any of the three grounds above. No alternative version has been produced. I am thus driven to the conclusion that the SMS in question constitutes spam.
19. The fact that the Member sent the spam itself means that there was a clear breach of clause 5.3.1 by the Member.

Sanctions

20. I note the decision of the adjudicator in complaint number 936, involving the same Member and SMSPortal (though its involvement in the instant complaint is apparently coincidental), and also involving the sending of unsolicited commercial messages. The adjudicator found breaches of clauses 5.1.2 and 5.3.1, issued the Member with a formal reprimand and ordered it to suspend its service to the IP until such time as it was in compliance with the provisions of the Code of Conduct, especially clause 5.
21. The following sanctions are imposed:
 - 21.1. This being its first offence *per se*, the Member is issued with a formal reprimand for its breach of clause 5.1.5 of the WASPA Code of Conduct.
 - 21.2. As the Member really should have known better after complaint 936, a fine of R 5 000 is imposed upon the Member for its breach of clause 5.3.1 of the WASPA Code of Conduct.