



Wireless Application Service Providers' Association

Adjudicator's Report

Complaint number	26500
Cited WASPA members	Star Mobile (1400) Blue Label Data Solutions (1234) Cellfind (0019)
Notifiable WASPA members	<i>na</i>
Source of the complaint	<i>Public</i>
Complaint short description	Spam SMS
Date complaint lodged	<i>13 May 2015</i>
Date of alleged breach	unknown
Applicable version of the Code	13.9
Clauses of the Code cited	5.15, 7.4, 16.4, 16.5, 16.9, 16.10, 16.11, 16.12, 16.13, 16.14, 16.15
Related complaints considered	<i>na</i>

Fines imposed	Star Mobile: In respect of Clauses 16.10, 16.11 and 16.13 – R50 000. In respect of Clause 16.12 – R5000
Is this report notable?	Not notable.

Initial complaint

The complainant submitted, in essence, that they received a spam SMS. The complainant questioned where his/her details were obtained, when he/she consented and what the opt out instructions meant.

Member's response

Cellfind stated that the services belonged to an affiliate member, Blue Label Data Solutions. It blocked the number on their systems.

Blue Label Data Solutions in turn redirected the complaint to Star Mobile.

While Star Mobile requested and received an extension, it then failed to respond to the complaint.

Clauses

5.15. Members must respect the constitutional right of consumers to personal privacy and privacy of communications.

7.4. Members must not refuse a reasonable request from WASPA for information about the services they operate, for the purpose of testing those services or for the purposes of resolving a complaint.

16.4. Any member authorising, directing or conducting any direct marketing must implement appropriate procedures to facilitate the receipt of a demand from a person who has been

approached for the purposes of direct marketing to desist from initiating any further communication (an "opt-out request").

16.5. Any member authorising, directing or conducting any direct marketing must not direct or permit any person associated with that activity to direct or deliver any communication for the purpose of direct marketing to:

- (a) a person who has submitted an opt-out request to that member,
- (b) a person who has registered a pre-emptive block with a registry established by the National Consumer Commission, or
- (c) a person who has registered a pre-emptive block with a registry established by WASPA.

16.10. A member may engage in direct marketing, or permit their facilities to be used for the purpose of direct marketing, to a person who:

- (a) has provided the party responsible for sending the direct marketing communication with his or her contact details in the context of the sale of a product or services, and the responsible party's own similar products or services are being marketed, and
- (b) has been given a reasonable opportunity to object, free of charge, and in a manner free of unnecessary formality, to such use of his or her details at the time when the information was collected and on the occasion of each subsequent direct marketing communication sent to that person.

16.11. A member may not engage in direct marketing, or permit their facilities to be used for the purpose of direct marketing other than as provided for above.

16.12. Any communication for the purpose of direct marketing must contain the details of the identity of the sender or the person on whose behalf the communication has been sent and an address or other contact details to which the recipient may send a request that such communications cease.

16.13. Upon request of the recipient of a direct marketing message, the member must, within a reasonable period of time, identify the source from which the recipient's contact details were obtained. The member must also provide proof that the recipient has given consent to receive that message, or alternatively provide proof that the recipient has provided his or her contact details in the context of the sale of a product or service the same as that being marketed.

16.14. Once a recipient has opted out, a message confirming the opt-out must be sent to that recipient. This confirmation message must specify the marketing from which the customer has been opted out, and the customer must not be charged for this message.

16.15. If technically feasible, a recipient must be able to opt out of any further direct marketing messages sent by SMS by replying to a message with the word 'STOP'. If this is not technically

feasible then clear instructions for opting out must be included in the body of each marketing message.

Decision

The WASP member who is *ex facie* responsible for the sending of the SMS in question, being Star Mobile, has not responded. I therefore have no choice but to rely on the material before me and accept it as *prima facie* correct. I also have no choice but to accept that Star Mobile is responsible for the material as it has not indicated or shown otherwise.

The complainant identified certain clauses, and those are the clauses that are *in toto* before me in this matter, as those are the only clauses to which the WASP has been asked to respond.

In the first place, the complainant alleges that the SMS received was spam and that he/she had not opted into receipt of the message or such marketing material in any manner. **This amounts to a *prima facie* breach of Clauses 16.10 and 16.11 and goes to the heart of this complaint.** There is nothing before me to show that the complainant in fact consented to receipt of such marketing messages, and the WASP failed to identify the source or provide proof of consent and is therefore also in **breach of Clause 16.13.**

There is nothing before me to suggest that the complainant's privacy was breached *per se*, and I find no breach of Clause 5.15.

Clause 7.4 states "Members must not refuse a reasonable request from WASPA for information about the services they operate, for the purpose of testing those services or for the purposes of resolving a complaint."

This clause presents an interesting question – in simply failing to answer the complaint, has the member "refused a reasonable request from WASPA for information about the services that they offer"? Clause 24.26. states that "If the member fails to respond within ten (10) working days, it will be assumed that the member does not wish to respond" and appears to recognise that this is within the rights of the member. Given this, I do not think a mere failure to respond to a complaint amounts to a breach of Clause 7.4, which in my opinion envisages an active refusal to engage with WASPA. I therefore find no breach of Clause 7.4.

The complainant also submitted that the opt out instructions were not clear. There is nothing to indicate that the WASP did not have an opt out system, or that the complainant had previously opted out or registered a pre-emptive block, or that SMSing “stop” did not terminate the SMS’s. There is therefore no breach of Clause 16.4 or 16.5, or 16.15. There is also nothing to show that sending an opt out message would not have resulted in a response as required by Clause 16.14, and I therefore find no breach of that clause.

The original message states, “Do you need a HOME, CAR or PERSONAL LOAN? We help everybody! Reply S or Please call Me to [number redacted]. Stop to opt out.”

There is no short code or other identifying information. It is also unclear if the “stop” message must be sent to the number that sent the SMS or the number in the SMS. **There is therefore a breach of Clause 16.12.**

Sanctions

The issue of spam, or non-consensual marketing, is a serious one. Star Mobile does not appear to have treated it as such in deciding simply not to respond to the complaint, aggravating the fact that there appears to be a prima facie breach of Clauses 16.10, 16.11 and 16.13, all of which go to this same issue. In respect of those clauses I therefore fine Star Mobile R50 000.

The breach of Clause 16.12 is less egregious in that it is more technical in nature, and in that the Code does not create as strenuous a duty on the WASP in relation to compliance and provision of information. I therefore fine Star Mobile R5000 in relation to this breach.