



## REPORT OF THE ADJUDICATOR

<b>WASPA Member (SP)</b>	ExactMobile
<b>Information Provider (IP)</b> (if any)	s/a
<b>Service Type</b>	Unsolicited commercial sms
<b>Source of Complaints</b>	Mr B Breytenbach
<b>Complaint Number</b>	4198
<b>Date received</b>	16 May 2008
<b>Code of Conduct version</b>	5.7

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### Complaint

The complaint deals with an alleged unsolicited sms received by the complainant from the SP on or about 15 May 2008. The complainant states in his complaint that he has not used the services of the SP for at least 3 years and regards the sms advertisement as unsolicited and an invasion of his privacy.

The complainant demands that he be removed from the SP's database and requests details of where the SP received his contact information. He also removes permission for the SP to provide third parties with his contact information.

Finally, the complainant complains that he was charged to opt-out of the SP's distribution list although he does not state how much he was charged.

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**SP Response**

The SP responded to the complaint on 9 June 2008. The SP states that the complainant was still a client and that all of his details were on their database. The SP alleges that the complainant registered on the SP's web site and, when doing so, opted to receive mobile marketing from the SP.

The SP alleges that the complainant would have received a number of messages from the SP and its clients over the past 3 years advertising products and services.

The SP has now removed the client from its Mobile Sponsorship list based on the current complaint. It has also confirmed that it does not share client information with any 3rd parties.

The SP states that its unsubscribe option costs no more than R1.00 as is required by the WASPA Code. The SP also states that the complainant could have unsubscribed via the SP's web site free of any charges.

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**Sections of the Code considered****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

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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. 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.

5.1.6. 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.

5.1.7. 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.

5.1.8. 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.

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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.

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## Decision

It appears from the complaint and the response that the complainant previously used the services of the SP but had not done so for some time. The SP alleges that the complainant registered his details on its website and also consented to receiving marketing messages from the SP from time to time.

There is currently no binding law in South Africa regarding the length of time that personal information can be held by a data controller. Section 51 of the Electronic Communications and Transactions Act 25 of 2002, sets out certain voluntary principles for the protection of personal information. Although there is no express provision of the length of time personal information can be kept, it appears that a period of 1 (one) year after the last use of the information would be regarded as reasonable.

The WASPA Code of Conduct is silent on how long consumers can be kept on a mailing list.

The SP alleges that the complainant would have received other messages in the past 3 years as a member of its mailing list. However judging from the complainant's reaction to receiving the sms advertisement in question, I find this hard to believe.

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In light of the foregoing, I am unable to decide, based on the information before me, whether the sms received by the complainant was unsolicited. However it is clear that the complainant now wants to be removed from the mailing list and the SP has confirmed that it has complied with his request.

There is no evidence before me that the SP has charged an amount in excess of R1.00 to unsubscribe the complainant.

I therefore find that the SP has not breached any of the provisions of the WASPA Code

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