



REPORT OF THE ADJUDICATOR

WASPA Member (SP)	Internet Filing (Pty) Limited
Information Provider (IP) (if any)	SARS
Service Type	Unsolicited commercial communications
Source of Complaints	Mr S I Low
Complaint Number	7308
Date received	11 August 2009
Code of Conduct version	7.4

Complaint

The complainant states that he received numerous unsolicited SMS messages on his mobile which read as follows:

Subject: Dear Employer.

Dear Employer. A reminder that your PAYE payment is due by 07/08/2009.

Please pay via your bank or nearest SARS branch. If already paid, thank you.

Regards SARS

The complainant alleges that there was no unsubscribe or "stop" mechanism given with the message.

SP's response

A formal response to the complaint was provided by the legal department at SARS after the matter had been referred to them by the SP.

The relevant sections of the response are as follows:

“

Interfile is for all intents and purposes SARS's authorised agent in this matter.

We place on record that it is not SARS's intent to harass, nor to unlawfully infringe, any taxpayers' rights to privacy with such an action.

SARS, as you are aware, fulfils its statutory duties in the national interest fulfilling a critical and strategic function for the general welfare of the people of South Africa. In pursuance of its legislative mandate to ensure compliance with all tax and customs legislation, SARS is under both a legal and moral obligation to inform and remind taxpayers and traders of their legal obligations. This includes the provision, either electronically or via post, of the relevant returns and other forms and documents required to be submitted to SARS by law. It also includes notification and reminders to taxpayers and traders of the due date for the submission of such returns and documentation as well as due dates for payments and other legal obligations.

SARS exercises its right and duty to provide taxpayers and traders with such information necessary to fulfil their obligations through a variety of media channels which is directly based on personal contact information provided to SARS by such registered taxpayers and traders. This includes postal and physical addresses, email addresses and telephonic (landline and cellular) numbers. Such information is provided to SARS in accordance with legislation with the purpose of providing channels of communication with and access to such clients.

As such, the use of SMS reminders is an administrative function which SARS exercises in compliance with the legal duties of fairness in the execution of such acts. It would obviously be inappropriate for taxpayers to have the option to “unsubscribe” from receiving notification of their legal obligations from SARS.

With regard to the particular complaint lodged by Mr Low and his contention that all notification should be referred to his accountant and not himself, SARS's legal

obligation is directly with taxpayers and traders and not their representatives, whether legally appointed or not.

SARS has sent out several million SMS reminders to taxpayers and Mr Low is the only taxpayer to date that has lodged a formal complaint, indicating that most taxpayers accept the reminders as reasonable and without any malicious intent to invade privacy rights. The fact that Mr Low's reminder was received at an unreasonable hour is regretted.

It is SARS policy, and SARS is in the process of restructuring its relationship the cellular network service providers, that such reminders will not be sent at unreasonable hours. The technical aspects of ensuring such time of delivery of SMS's is the subject of service levels being negotiated at present with the cellular network providers.

We also refer to our discussions and place on record, with respect, that the whole "mischief" of the WASPA Code is centred on regulating commercial spam communications, advertising and pricing, children's services, adult services, competitions, contact and dating services and subscriptions services and it is difficult to construe the exercising of a legislative mandate through taxpayer reminders within the WASPA Code.

Nevertheless, it is not our intention to raise technical and jurisdictional issues at this stage as it is our view that the matter with Mr Low has been resolved in terms of this deposition.

Kindly advise whether you regard the matter as settled, and if not, we await your response and requirements for further adjudication.

The rights of SARS and Interfile remain fully reserved.

Sections of the Code considered

2.8. A “**commercial message**” is a message sent by SMS or MMS or similar protocol that is designed to promote the sale or demand of goods or services whether or not it invites or solicits a response from a recipient.

2.22. “**Spam**” means unsolicited commercial communications, including unsolicited commercial messages as referred to in section 5.2.1.

4.2. Privacy and confidentiality

4.2.1. WASPA and its members must respect the constitutional right of consumers to personal privacy and privacy of communications.

4.2.2. Members must respect the confidentiality of customers' personal information and will not sell or distribute such information to any other party without the explicit consent of the customer, except where required to do so by law.

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. For SMS and MMS communications, 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 SMS and MMS communications, 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. 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 (within the last six months) 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.

Decision

The complaint is based on 2 issues:

1. Whether the complainant has received SMS messages in contravention of section 5 of the WASPA Code; and
2. Whether the complainant's right to privacy has been infringed.

Section 5 of the WASPA Code is aimed at preventing consumers from receiving unsolicited commercial communications and to provide a mechanism for consumers to opt-out of receiving such messages from service and information providers.

Commercial messages are defined in the Code as messages sent by SMS or MMS or similar protocol that are designed to promote the sale or demand of goods or services whether or not it invites or solicits a response from a recipient.

In the current dispute, the messages in question have been sent by the SP acting as a duly authorised agent of the South African Revenue Service (SARS). The messages form part of a public service to facilitate better communication and information sharing between SARS and taxpayers.

The SMS messages are not designed to promote the sale or demand of goods or services and therefore do not constitute "commercial messages" as defined in the Code. Instead, the SMS messages are the modern equivalent of notices, reminders

and other information traditionally sent by SARS across other communication platforms to registered taxpayers.

As a registered taxpayer, the complainant is obliged to provide his details to SARS and to be included on their database. He cannot request that he be removed from the SARS database. Indirectly, he is therefore prevented from opting out of receiving further public service messages from SARS. I therefore do not believe that it was necessary for the SMS messages in question to contain an opt-out mechanism.

There has been no contravention of section 5 of the Code.

Regarding the complainant's right to privacy, it is settled in our law that SARS, as a public body, and through its authorised agents, has an obligation to respect and uphold the complainant's constitutional and common law right to privacy. While it remains challenging to define, with any degree of certainty, what the substance of the right to privacy is in the modern economy, it does include the right of citizens to be free from unwanted and/or unreasonable intrusions into their private lives.

In terms of the new Consumer Protection Act of 2008, direct marketing communications are prohibited during certain times of the day and on certain days of the week. Although these days and times still need to be confirmed by the Minister, it can be assumed that they will include times that a reasonable person will not expect to receive commercial messages (e.g. late into the evening or very early in the morning).

The WASPA Code contains similar provisions and prohibits the sending of any commercial messages between 20h00 and 06h00.

While such provisions pertain to commercial communications, it would be reasonable to expect that the provision of government services should follow similar guidelines, except perhaps in circumstances which warrant communication at any time of the day or night.

SARS, in its response, has acknowledged this and has stated that it is not its policy to send messages to taxpayers at unreasonable times of the day. This is the only

complaint of this nature that has been received and an apology has been given to the complainant by the SP and SARS.

SARS have also indicated that it is in the process of resolving this issue with its cellular network service providers to prevent similar occurrences in the future.

I am therefore satisfied with the SP's response and do not find that there has been a contravention of the WASPA Code. This complaint is accordingly dismissed.
