



REPORT OF THE ADJUDICATOR

Complaint reference number:	#7522
WASPA member(s):	Opera Telecom t/a Opera Interactive
Membership number(s):	
Complainant:	Public
Type of complaint:	Unlawful Lottery / Pricing
Date complaint was lodged:	2009-09-04
Date of the alleged offence:	2009-09
Relevant version of the Code:	7.4
Clauses considered:	3.1.2, 3.9.1, 3.9.2, 4.1.1, 4.1.10, 4.1.11, 6.1.1, 6.2.5, 9.1.1
Relevant version of the Ad. Rules:	2.3
Clauses considered:	5.2.1.2, 8.2.2
Related cases considered:	7103, 7104, 7105, 7289, 7317

Complaint

1. On 04 September 2009 a complaint was submitted to the WASPA secretariat by a journalist relating to short code 39571 which is operated by Opera Telecom t/a Opera Interactive (the SP) in which the complainant indicated that:
 - 1.1. the SP had contravened the Lotteries Act 57 of 1997 (hereinafter the “Lotteries Act”) and offered a prize which did not promote anything as required by the Lotteries Act;
 - 1.2. The position of the SMS cost was incorrect;
 - 1.3. There were no terms and conditions for the promotion; and
 - 1.4. The Oxygen8.com was in some way connected to the SP and failed to have a link to

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WASPA as required by clause 4.1.11.

SP Response

2. The SP then responded on the 23rd September 2009 by requesting an extension which was duly granted by the WASPA secretariat. Thereafter the SP replied by indicating:
 - 2.1. "3.1.2 : We are of the opinion that the sunlight brand is being promoted with this promotion, hence this does not fall within the illegal lotteries act.
 - 2.2. SMS costs wrongly positioned : The costs are printed directly below the entry mechanism.
 - 2.3. Unfortunately the copy faxed through is nearly unreadable and this promotion had completed when this complaint was received.
 - 2.4. The complainant has lodged several complaints against various WASPs with 'illegal lottery' being stated as his main concern. We would have serious concerns about this person having ulterior motives."
 3. The SP sent an additional email on the 14 October 2009 in which they indicated that the magazine for which the complainant purportedly worked had no knowledge of the complainant as an employee.
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WASPA Secretariat request

4. The WASPA secretariat contacted the adjudicator and requested that this matter be put on hold pending the outcome of the appeal in the matter of complaints 7103, 7104 and 7105. The adjudicator duly agreed to this postponement as the appeal in the said matters dealt with the issue of the unlawfulness of promotional competitions.
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Outcome of Appeal in complaints 7103, 7104 and 7105

5. The appeal in the above complaints was duly delivered on the 04 January 2011. Within the appeal it was duly found that WASPA adjudicators do not have the right to make a

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finding on the lawfulness or otherwise of WASPA members' conduct. As the merits of this argument were fully traversed within that adjudication which is easily available on the WASPA web site they are not repeated here.

Complainant Dies

6. Thereafter on the 09 June 2011 the WASPA secretariat was informed by the complainant's wife that the complainant had passed away and further that she wished to close all complaints lodged by her husband.
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Portions of the Code of Conduct (version 7.4) considered:

7. **3.1.2.** Members are committed to lawful conduct at all times.
8. **4.1.1.** Members must have honest and fair dealings with their customers. In particular, pricing information for services must be clearly and accurately conveyed to customers and potential customers.
9. **4.1.11.** Members' web sites must include a link to the WASPA web site and/or this Code of Conduct.
10. **6.1.1.** In addition to the provisions listed below all members are bound by the WASPA Advertising Rules, published as a separate document.
11. **6.2.5.** The price for a premium rated service must be easily and clearly visible in all advertisements. The price must appear with all instances of the premium number display.
12. **9.1.1.** Any promotional material for a competition service must clearly display the full cost to enter the competition and any cost to the user to obtain the prize.
13. **9.1.2.** Any promotional material for a competition service must include details of how the competition operates.
14. **9.1.4.** Promotional material must clearly state any information which is likely to affect a decision to participate, including:

(a) the closing date;

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(b) any significant terms and conditions, including any restriction on the number of entries or prizes which may be won;

(c) an adequate description of prizes, and other items offered to all or a substantial majority of participants, including the number of major prizes;

(d) any significant age, geographic or other eligibility restrictions;

(e) any significant costs which a reasonable consumer might not expect to pay in connection with collection, delivery or use of the prize or item;

(f) the entry mechanism and workings of the competition.

Decision

15. From the above facts it is clear that whether there has or has not been a breach of the Lotteries Act is irrelevant for the purposes of this adjudication as WASPA adjudicators do not have the jurisdiction to make a finding on this issue. Equally the question as to whether or not the promotion actually promotes a product is not relevant for the purposes of this adjudication for the same reason.

16. The promotion is clearly a “competition service” as defined in the WASPA Code of Conduct version 7.4. This conclusion is supported by the text “Win R30 000 and 2000 instant airtime prizes SMS SUNLIGHT to 39571 to enter and to download Flash in the Pan episodes to your cell phone” (see Annexure B). Approximately 2-3 cm from this text in a smaller font there is text which clearly refers to the price of the SMS but due to its size and the poor quality of the reproduction of the advertisement it is difficult to definitively indicate what the text says. However it would appear to indicate: “R1/SMS incl. VAT. Free minutes do not apply.” A quick check on the relevant SMS code confirms that the price of that short code is R1 per SMS (see www.smscode.co.za).

17. That the terms and conditions relating to a competition must be stated can be found in clause 9.1.4 of the WASPA CoC. Notwithstanding that the complainant clearly alleged that there were no terms and conditions relating to the competition, the SP chose not to respond to this allegation. Based on the allegation by the complainant, the advertisement as set out in Annexure B and the failure by the SP to deny that terms and conditions relating to the competition were unavailable, the SP is found to have

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breached clause 9.1.4 of the WASPA CoC.

18. The next contravention alleged by the complainant was the failure to correctly advertise the price of entering the competition. From the advertisement that the fee to enter the competition is R1 per SMS. Certainly it is not alleged that the SMS fee was omitted entirely, but rather that the SMS fee was not positioned correctly as required by the Advertising Rules version 2.3. As regards the issue of pricing it should be said that it appears as though the medium in question through which the advertisement was published was an booklet. As such the booklet would be covered by section 5 of the Advertising Rules.
19. It is a requirement that the cost of the SMS be highlighted to consumers. While the cost of the SMS is indicated it is not highlighted as is required. A reference to the Advertising Rules (clause 5.2.1) indicates that the cost of the service must be at least font size 11 and in close proximity to the short code to be used (“immediately below, or above, or adjacent to the unique access number”). This requirement was clearly not followed by the promoter in question as the text which cost of the SMS was mentioned was not immediately below the text to enter the competition as to make it possible that the casual reader would not notice the cost of the SMS. Indeed it is precisely for this reason that several examples of where to place the cost of the SMS are provided within the Advertising Rules.
20. There only remains the question as to whether clause 8.2.2 or clause 5.2.1 of the Advertising Rules was breached. The two sections (clause 5 and clause 8) are intended to deal with different media where clause 5 is aimed at Magazines and clause 8 applied to below the line advertising. It would appear that the current promotion may fall within “promotional flyers/ leaflets” but this advertisement could also be an “in-house magazine” as provided for in clause 5. As I do not have access to the original medium it is difficult to definitively indicate which clause would be more appropriate in this matter. However, bearing in mind the similarity between the clauses (they are essentially identical) I find that clause 5.2.1 of the Advertising Rules has been breached.
21. The listed web site on the WASPA web site for the SP is www.operaintereactive.co.za. A brief look through this web site makes it clear that the SP has failed to refer to the WASPA code of conduct on its web site as required by clause 4.1.11. As this allegation was not put to the SP by the complainant and the SP has not had an opportunity to

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address this allegation no finding can be made in this respect. However the WASPA secretariat is hereby directed to request the WASPA monitor to investigate this issue further and, if appropriate, to lay a complaint against the SP.

22. While the above conclusions essentially conclude the adjudication, three additional questions are of somewhat academic interest, which are:

22.1. In the event that the complainant withdraws the complaint must the adjudicator abandon the complaint?

22.2. Should this complaint be referred to the Lotteries Board for further investigation?

22.3. Does a delay in the adjudication of a matter influence the outcome of the adjudication?

23. These questions have been dealt with in complaint 7289 and reference should be made to the comments made therein.

24. For the above reasons clause 9.1.4 of the WASPA Code of Conduct as well as clause 6.2.5 as read with Advertising Rule 5.2.1 has been found to have been breached, but the SP is found not to have breached clause 3.1.2.

Mitigation

25. N/A.

Aggravation

26. The SP failed to fully address the complaint.

27. Since 2008 various WASPA adjudicators have upheld 21 complaints against the SP. Of these four of them refer to a breach of clause 9.1.4 of the WASPA Code of the Conduct and as such the SP is not new to the requirements of clause 9.1.4. Five of these complaints which were upheld refer to clause 6.2.5 and once again the SP is not new to the requirements of this clause.

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Sanction Imposed

28. The SP is fined an amount of R12 000.00.
 29. The SP is warned to be aware of the requirements relating to linking to the WASPA web site as required by clause 4.1.11 of the WASPA Code of Conduct.
 30. The WASPA monitor is directed to consider whether the SP in this matter is complying with clause 4.1.11 and to lay a complaint if appropriate.
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Annexure A – Complaint

PLEASE NOTE THAT SOME IDENTIFYING PERSONAL INFORMATION HAS BEEN REMOVED BY THE ADJUDICATOR DUE TO THE FACT THAT THIS ADJUDICATION WILL BE PUBLICLY AVAILABLE.

----- Original Message -----

From: "<REMOVED BY ADJUDICATOR>

To: <REMOVED BY ADJUDICATOR>

Cc: "Complaints" <complaints@waspa.org.za>

Sent: Friday, September 04, 2009 2:34 PM

Subject: [WASPA.complaints] [formal] WASPA Code of Conduct complaint

Ref:#7522

Dear WASPA member,

The attached complaint has been lodged with WASPA against Opera Interactive.

This complaint is being processed according to the formal complaint procedure described in section 13.3 of the Code of Conduct.

< template notice and attachment stripped by Bretton

--- A copy of the complaint follows below ---

Complainant : <REMOVED BY ADJUDICATOR>

Email : <REMOVED BY ADJUDICATOR>

Referred :

Date : 2009/09/03

Wasp_Service : Opera Interactive

Description : See attached fax complaint

Status : Formal

Attached file : 28927977_Opera2.pdf

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Annexure B – Attachment04/09 2009 00:38 FAX
Code of Conduct Complaint001
Page 1 of 3

WASPA Wireless Application Service Providers' Association

home | about waspa | join waspa | list of members | code of conduct | documents | member login

about
code of conduct
code archive
advisory notices
advertising rules
children's viewing times
complaint reports
search complaints
 lodge a complaint

Code of Conduct Complaint Form

If you don't wish to send an electronic complaint you can print the following and send to WASPA via fax: 086-606-2016 or at the following postal address:

WASPA
PO Box 3143
Parklands
2121

Please ensure that:

- You include the *correct email address* as we use this for communicating with you
- You include the *specific cellular number* that is affected.
- You tick the **Declaration by Complainant** field in the form below. This is a requirement for accepting complaints.

Complainant's details:

Full Name: Hannes Senekal
Cellular Number: 0834680805
Alternate Contact Number: 0413601669
Email Address: s3n3kal@iburst.co.za
Physical Address: 18 Carrington Place
Wesley Street
Cotswold Ext
Port Elizabeth 6025
Postal Address: As above
Post Code:

Affiliation (please tick one):

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

If you wish to provide additional information about your affiliation, please do so here:

<http://www.waspa.org.za/code/complaint.shtml>

9/4/2009

Annexure C - Reply

----- Original Message -----

From: <REMOVED BY ADJUDICATOR>

To: "<REMOVED BY ADJUDICATOR>

Cc: "Complaints" <complaints@waspa.org.za>

Sent: Tuesday, September 08, 2009 8:33 AM

Subject: [WASPA.complaints] [Fwd: [formal] WASPA Code of Conduct complaint

Ref:# 7522]

Dear Opera,

As requested by <REMOVED BY ADJUDICATOR>, extension granted for this complaint until COB,
22 September 2009.

Regards

<REMOVED BY ADJUDICATOR>

WASPA

----- Original Message -----

Subject: [WASPA.complaints] [formal] WASPA Code of Conduct complaint

#7522

Ref:# 7522

Date: Fri, 04 Sep 2009 14:34:13 +0200

From: <REMOVED BY ADJUDICATOR>

Reply-To: complaints@waspa.org.za

Organisation: Wireless Access Providers' Association

To: <REMOVED BY ADJUDICATOR>

CC: Complaints <complaints@waspa.org.za>

Dear WASPA member,

The attached complaint has been lodged with WASPA against Opera Interactive.

This complaint is being processed according to the formal complaint procedure described in section 13.3 of the Code of Conduct.

Accordingly:

- You have five working days to respond to the complaint, and to provide the WASPA secretariat with any information you deem to be relevant to this complaint.
- After five working days have passed, this complaint, together with your response (if any) will be assigned to an adjudicator for review, and if upheld, determination of appropriate sanctions.
- You do not have an obligation to respond to this complaint. Should the WASPA secretariat not receive any response from you within this time period, it will be assumed that you do not wish to respond.
- Your response, and any other correspondence relating to this complaint, must be sent to <complaints@waspa.org.za>. Correspondence sent to any other address may not be deemed to constitute a formal response.
- The WASPA Secretariat will confirm receipt of your response.

If you have any questions regarding the Code of Conduct or the complaints procedure, please address your queries to complaints@waspa.org.za.

Please confirm your receipt of this message.

Warm regards,
WASPA Secretariat

--- A copy of the complaint follows below ---

Complainant : <REMOVED BY ADJUDICATOR>

Email : <REMOVED BY ADJUDICATOR>

Referred :

Date : 2009/09/03

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Wasp_Service : Opera Interactive

Description : See attached fax complaint

Status : Formal

Attached file : 28927977_Opera2.pdf

Annexure D - Reply

Original Message -----

From: "<REMOVED BY ADJUDICATOR>

Sent: Wednesday, September 23, 2009 4:24 PM

Subject: Re: [WASPA.complaints] Reminder: WASPA Code of Conduct complaintRef:# 7522

Hi <REMOVED BY ADJUDICATOR>,

In reference to the complaint:

3.1.2 : We are of the opinion that the sunlight brand is being promoted with this promotion, hence this does not fall within the illegal lotteries act.

SMS costs wrongly positioned : The costs are printed directly below the entry mechanism.

Unfortunately the copy faxed through is nearly unreadable and this promotion had completed when this complaint was received.

The complainant has lodged several complaints against various WASPs with 'illegal lottery' being stated as his main concern. We would have serious concerns about this person having ulterior motives.

Thanks

<REMOVED BY ADJUDICATOR>

-----Original Message-----

From: WASPA Complaints (Lorraine Hartzler) [mailto:complaints@waspa.org.za]

Sent: 23 September 2009 07:51

To: <REMOVED BY ADJUDICATOR>

Cc: Complaints

Subject: Reminder: WASPA Code of Conduct complaint Ref:# 7522

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Dear WASPA member,

This message serves as notification that the WASPA Secretariat has not received any response from your company regarding the attached complaint. As set out in the formal complaint procedure in section 13.3 of the WASPA Code of Conduct, members have five working days to provide a response to any complaints lodged.

While you are not required to provide WASPA with a response, should no response be forthcoming from your office today, the WASPA Secretariat will be obliged to hand this complaint to an adjudicator without the benefit of your input.

Should you still wish to respond, your reply should be sent to complaints@waspa.org.za and must be submitted by the close of business today.

Please confirm your receipt of this message.

Warm regards,
WASPA Secretariat

--- original notification attached ---

----- Original Message -----

Subject: [WASPA.complaints] [Fwd: [formal] WASPA Code of Conduct complaint Ref:# 7522]

Date: Tue, 08 Sep 2009 08:33:45 +0200

From: WASPA Complaints (Lorraine Hartzler) <complaints@waspa.org.za>

Reply-To: <REMOVED BY ADJUDICATOR>

CC: Complaints <complaints@waspa.org.za>

Dear Opera,

As requested by <REMOVED BY ADJUDICATOR>, extension granted for this complaint until COB,
22 September 2009.

Regards
<REMOVED BY ADJUDICATOR>
WASPA

----- Original Message -----

Subject: [WASPA.complaints] [formal] WASPA Code of Conduct complaint Ref:# 7522

Date: Fri, 04 Sep 2009 14:34:13 +0200

From: <REMOVED BY ADJUDICATOR>

Organisation: Wireless Access Providers' Association

To: <REMOVED BY ADJUDICATOR>

#7522

CC: Complaints <complaints@waspa.org.za>

Dear WASPA member,

The attached complaint has been lodged with WASPA against Opera Interactive. This complaint is being processed according to the formal complaint procedure described in section 13.3 of the Code of Conduct.

Accordingly:

- You have five working days to respond to the complaint, and to provide the WASPA secretariat with any information you deem to be relevant to this complaint.
- After five working days have passed, this complaint, together with your response (if any) will be assigned to an adjudicator for review, and if upheld, determination of appropriate sanctions.
- You do not have an obligation to respond to this complaint. Should the WASPA secretariat not receive any response from you within this time period, it will be assumed that you do not wish to respond.
- Your response, and any other correspondence relating to this complaint, must be sent to complaints@waspa.org.za . Correspondence sent to any other address may not be deemed to constitute a formal response.
- The WASPA Secretariat will confirm receipt of your response.

If you have any questions regarding the Code of Conduct or the complaints procedure, please address your queries to complaints@waspa.org.za .

Please confirm your receipt of this message.

Warm regards,
WASPA Secretariat

--- A copy of the complaint follows below ---

Complainant : <REMOVED BY ADJUDICATOR>

Email : <REMOVED BY ADJUDICATOR>

Referred :

Date : 2009/09/03

Wasp_Service : Opera Interactive

Description : See attached fax complaint

Status : Formal

Attached file : 28927977_Opera2.pdf

Annexure E – Confirmation of Receipt

----- Original Message -----

From: <REMOVED BY ADJUDICATOR>

To: <REMOVED BY ADJUDICATOR>

Sent: Wednesday, October 14, 2009 10:40 AM

Subject: Re: [WASPA.complaints] [formal] Confirmation of Receipt Ref:#7522

Dear WASPA Secreteriat.

We would like to submit the information below provided by Noseweek as additional information to the complaint.

Regards,

<REMOVED BY ADJUDICATOR>

-----Original Message-----

From: noseaccounts [mailto:accounts@noseweek.co.za]

Sent: 02 October 2009 01:54 PM

To: <REMOVED BY ADJUDICATOR>

Subject: Re: Staff Query

Dear <REMOVED BY ADJUDICATOR>

I do not know anyone by that name at noseweek. He is not a staff member.

Please send me his email address so that I can address this matter.

Kind regards

<REMOVED BY ADJUDICATOR>

-----Original Message-----

From: WASPA Complaints (<REMOVED BY ADJUDICATOR>)

[mailto:complaints@waspa.org.za]

Sent: 14 October 2009 09:33 AM

To: <REMOVED BY ADJUDICATOR>

Cc: complaints@waspa.org.za

Subject: [formal] Confirmation of Receipt Ref:#7522

Dear WASPA member,

Thank you for this reply. This message serves as confirmation of receipt of your response by the WASPA Secretariat.

The WASPA Secretariat will now forward the case file for this complaint, to an Independent Adjudicator for review. On the basis of the evidence presented, the Adjudicator will determine if a breach of the WASPA Code of Conduct has occurred, and will determine appropriate sanctions.

It is possible that the Adjudicator will request additional

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information from either you, or the complainant, or both.

Once this process has been completed, the Adjudicator will provide a detailed report to the WASPA Secretariat. We will forward a copy of this report to you as soon as we receive it.

If you have any questions about the Code of Conduct, or about the complaints process, please contact <complaints@waspa.org.za>.

Warm regards,
WASPA Secretariat

<REMOVED BY ADJUDICATOR>wrote:

Hi <REMOVED BY ADJUDICATOR>,

In reference to the complaint:

3.1.2 : We are of the opinion that the sunlight brand is being promoted with this promotion, hence this does not fall within the illegal lotteries act.

SMS costs wrongly positioned : The costs are printed directly below the entry mechanism.

Unfortunately the copy faxed through is nearly unreadable and this promotion had completed when this complaint was received.

The complainant has lodged several complaints against various WASPs with 'illegal lottery' being stated as his main concern. We would have serious concerns about this person having ulterior motives.

Thanks
<REMOVED BY ADJUDICATOR>

-----Original Message-----

From: WASPA Complaints (Lorraine Hartzer)
[mailto:complaints@waspa.org.za]
Sent: 23 September 2009 07:51
To: <REMOVED BY ADJUDICATOR>
Cc: Complaints
Subject: Reminder: WASPA Code of Conduct complaint Ref:# 7522

Dear WASPA member,

This message serves as notification that the WASPA Secretariat has not received any response from your company regarding the attached complaint. As set out in the formal complaint procedure in section

#7522

13.3 of the WASPA Code of Conduct, members have five working days to provide a response to any complaints lodged.

While you are not required to provide WASPA with a response, should no response be forthcoming from your office today, the WASPA Secretariat will be obliged to hand this complaint to an adjudicator without the benefit of your input.

Should you still wish to respond, your reply should be sent to <complaints@waspa.org.za and must be submitted by the close of business today.

Please confirm your receipt of this message.

Warm regards,
WASPA Secretariat

--- original notification attached ---

----- Original Message -----

Subject: [WASPA.complaints] [Fwd: [formal] WASPA Code of Conduct complaint Ref:# 7522]
Date: Tue, 08 Sep 2009 08:33:45 +0200
From: WASPA Complaints (<REMOVED BY ADJUDICATOR> <complaints@waspa.org.za
Reply-To: complaints@waspa.org.za
Organisation: Wireless Access Providers' Association
To: <REMOVED BY ADJUDICATOR> CC: Complaints <complaints@waspa.org.za

Dear Opera,

As requested by Andre, extension granted for this complaint until COB, 22 September 2009.

Regards
<REMOVED BY ADJUDICATOR>
WASPA

----- Original Message -----

Subject: [WASPA.complaints] [formal] WASPA Code of Conduct complaint Ref:# 7522
Date: Fri, 04 Sep 2009 14:34:13 +0200
From: WASPA Complaints (<REMOVED BY ADJUDICATOR> <complaints@waspa.org.za
Reply-To: complaints@waspa.org.za
Organisation: Wireless Access Providers' Association
To: <REMOVED BY ADJUDICATOR> CC: Complaints <complaints@waspa.org.za

Dear WASPA member,

#7522

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This complaint is being processed according to the formal complaint procedure described in section 13.3 of the Code of Conduct.

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Please confirm your receipt of this message.

Warm regards,
WASPA Secretariat

--- A copy of the complaint follows below ---

Complainant : <REMOVED BY ADJUDICATOR>

Email : <REMOVED BY ADJUDICATOR>

Referred :

Date : 2009/09/03

Wasp_Service : Opera Interactive

Description : See attached fax complaint

Status : Formal

Attached file : 28927977_Opera2.pdf

#7522

No virus found in this incoming message.

Checked by AVG - www.avg.com

Version: 8.5.421 / Virus Database: 270.14.12/2431 - Release Date:
10/13/09 19:11:00