

REF.NO:-DPO/DEC/3

IN THE MATTER OF:-

Complainant

VERSUS

Respondent No.1

Respondent No. 2

A complaint was lodged on 17 December 2010 at the Data Protection Office under section 11 of the Data Protection Act against Respondent No.1 for unauthorised marketing whereby the complainant alleged that on 17 December 2010, at about 16.58 p.m, he received a message through short message service (SMS) on his private mobile phone number reading as follows "INVEST IN LAND. Buy land on the heights of Les Marianes. Show day Sunday 19 Dec from 14h30 onwards. Phone (respondent no. 1)for more info: (.....)" without his consent. The number is private and registered on his name at Orange Mauritius Telecom. The complainant has further requested an enquiry by this office as to how the leakage of his private mobile number has taken place.

Complainant then tried to phone on the sending number but the voice response indicated that the number does not exist. He further contacted orange service 150 to enquire about the number and was informed that there is no registration of that number but could ascertain that the phone number placed on the advert which is different from the sending number in fact belongs to Respondent No.1.

The complainant voluntarily showed the SMS containing the concerned advert to the enquiring officer. Since complainant is no other than an officer of this office, to ensure a transparent, fair and non-biased enquiry, the investigation was carried out by an investigative officer delegated by the Commissioner for that purpose wherein the confidentiality of the enquiry was preserved and the legitimate expectation of the respondents to an impartial enquiry and decision was properly observed.

The enquiry revealed that Respondent No.1 has outsourced the marketing activities of the company to Respondent 2, a data processor. Respondent No.1 further stated by way of declaration on 21.04.11 that he has been made aware of the relevant sections of the Data Protection Act namely sections 22, 24 and 30 and that he is satisfied with the enquiry conducted by this office.

Respondent No. 2 has informed this office by way of a written statement on 21.04.11 that he has constituted a database of his customers which consists of their demographic details and phone numbers and that the marketing activities of the company are carried out with the prior written consent of his

customers through duly signed forms. He has further stated that each month a message is sent to the subscribers to deregister should they wish to do so. In the event that there is no reply, they remain on the database. The incident according to him may have cropped up due to an inadvertent error wherein a number has been wrongly or erroneously inputted in the database or a subscriber fails to deregister from the service when given the opportunity. He further gave the assurance that minute care would be exercised to prevent the recurrence of such incidents in the future and was satisfied with the manner in which the enquiry was conducted.

Respondent No. 2 has shown the enquiring officer voluntarily his mobile which is used to send SMSs on behalf of Respondent No.1 for advertisement purposes. He has compiled a database of mobile numbers which is used to send SMSs on a monthly basis. He has also shown the enquiring officer the list of customer numbers who have been removed (deregistered) from the database on a monthly basis.

The enquiring officer scheduled a site visit on 27th April 2011 at respondent No.2's premises. The latter further showed the enquiring officer approximately 50 forms of customers who have duly signed and accepted to receive those SMSs.

The enquiring officer continued his investigation at Respondent No. 1's premises on 9th June 2011 and informed Respondent No.1, that in accordance with section 24 of the Data Protection Act, he must ensure that respondent No. 2 is only sending SMSs to those who consent to receive the required advert.

Respondent No. 2 was also informed to stop sending SMSs though there was initially a written consent to accept SMSs about marketing when the customer does not wish to receive SMSs anymore.

Respondent No. 1 was required to notify all its agents and concerned stakeholders to ensure that express consent of individuals for marketing have been obtained before any advert is sent through a third party or data processor to them.

The complainant has given a written declaration on 20 June 2011 that he is satisfied with the outcome of the enquiry and the prompt action taken by this office since corrective measures have already been implemented by the respondents as he did not receive any more advert SMSs from them.

The Data Protection Commissioner has decided as follows:-

It has been proven beyond reasonable doubt that the SMS was sent through genuine error to Complainant on his mobile and was not meant to cause any prejudice to him. However, both respondents are required to ensure that they are carrying out their marketing activities in compliance with the relevant provisions of the Data Protection Act particularly Part IV of the Act to avoid any harm or prejudice to the individuals concerned whilst doing advertisement through sms. Failure to comply with these provisions may result in prosecution by this office.

Respondent No. 1 is also required to provide a more user friendly and efficient marketing system where the option to deregister or opt-out is incorporated in the sms itself before sending. An opt-in consent clause system may also be envisaged by Respondent No.1 to confirm express consent of the customers electronically together with the signing of the appropriate consent forms as already catered for by him.

Respondent No. 1 is further informed that the consent collected for product marketing purposes should be used solely for the described purposes and cannot be used for different and incompatible purposes with marketing unless express consent is again obtained from the customer for these different purposes.

Respondent No.1 must also ensure that the appropriate security and organisational measures are taken to protect the personal data of the customers.

Respondent No. 2 is informed that in accordance with section 27 of the Data Protection Act, he is also required to enter into a written contract with the data processor, i.e, Respondent No. 1 in this case, which must provide that the latter will act only on the instructions received from the data controller, i.e, Respondent No. 2 and is bound by the obligations devolving on the data controller.

The complaint is thus set aside subject to the above legal conditions being fulfilled.

MrsDrudeishaMadhub

Data Protection Commissioner

Data Protection Office

Prime Minister's Office

4th floor, Emmanuel Anquetil Building,

Port Louis

24.06.11