

GENERAL PRACTITIONER v GOLDSHIELD

MacroBid email

A general practitioner complained that Goldshield had sent him, via an agency, an unsolicited email about MacroBid (nitrofurantoin) to his NHS email address. This was a working email address, the utility of which would be rapidly degraded by advertising or infomercial emails. The complainant stated that he had not knowingly signed up to receive any information from Goldshield or any other pharmaceutical company; it was most unwelcome. The ability to be able to unsubscribe did not in any way excuse the activity.

The Panel noted that the Code prohibited the use of email for promotional purposes except with the prior permission of the recipient. The Panel considered that the email on MacroBid was clearly promotional material. Whilst it had not been sent directly by Goldshield it was nonetheless an established principle under the Code that pharmaceutical companies were responsible for work undertaken by third parties on their behalf.

The Panel also noted that health professionals were told by telephone that the agency would, from time to time, send details by email about its affiliates' products and services which might include updates on specialist services, conferences and seminars, diagnostic, medical, pharmaceutical and promotional materials as well as official information. The text did not make it abundantly clear that the company intended to send promotional material from pharmaceutical companies; the text referred to pharmaceutical *and* (emphasis added) promotional materials as if the two were wholly separate. Furthermore, the text referred to 'affiliates' of the agency. In the Panel's view pharmaceutical companies were not affiliates of the agency, and would not be seen as such. Pharmaceutical companies would be purchasing a service from the agency. Similar text appeared in the subsequent confirmatory email.

The Panel considered that the email had been unsolicited. There was no evidence to show that the complainant had given prior, fully informed, consent to receive by email promotional material from a pharmaceutical company. A breach of the Code was ruled which was upheld on appeal by Goldshield.

The Authority subsequently reported Goldshield to the Appeal Board due to its failure to provide the requisite undertaking and assurance in relation to the Appeal Board's ruling of a breach of the Code. An amended signed form of undertaking was subsequently provided by Goldshield.

The Appeal Board was very concerned that

Goldshield had not provided the requisite undertaking within the time set out in the Constitution and Procedure. The Appeal Board noted that the company was not a member of the ABPI but it had agreed to comply with the Code and accept the jurisdiction of the Authority. The Appeal Board decided that as in effect Goldshield had not continued to use material in breach of the Code it would not take further action at this stage. It expected the company to comply with the Constitution and Procedure in the future otherwise it could no longer be included on the list of non members that complied with the Code.

A general practitioner complained about an unsolicited email about MacroBid (nitrofurantoin) received from Goldshield Pharmaceuticals via an agency

COMPLAINT

The complainant explained that the email was sent to his NHS email address. This was a working email address, the utility of which would be rapidly degraded by advertising or infomercial emails if the industry took up this practice. The complainant stated that he had not knowingly signed up to receive any information from Goldshield or any other pharmaceutical company; it was most unwelcome.

The complainant submitted that if the sending of SPAM emails was not already contrary to the Code then he thought it should be. The complainant was astonished that Goldshield allowed its name to be associated with this behaviour as sending SPAM was associated with the seedier side of the Internet and was a practice frowned upon by most reputable organisations which wished to preserve a good name. The ability to be able to unsubscribe did not excuse the activity.

When writing to Goldshield the Authority asked it to respond in relation to Clause 9.9 of the Code.

RESPONSE

Goldshield submitted that an agency with over fifteen years' experience of working with the NHS had asked it to sponsor of its electronic medical education services for health workers. As a result Goldshield agreed to sponsor four educational emails which were produced by the agency and these were sent to a range of health workers on their database (including GPs, hospital pharmacists, nurses and hospital specialists) who might have an

interest in a range of disease areas. The disease areas sponsored by Goldshield were pain management and urinary tract infection.

The main section of each educational email was written by an independent writer. Two emails had been sent – the first in September 2007 on pain management and the other in January 2008 on urinary tract infection in the community (the email in question).

Goldshield was assured by the agency that the educational email conformed to the Code in the way in which it had both obtained permission from health workers to send information and its strict opt-out policy. Permission to contact health workers was obtained in a two-step process:

Firstly, each health worker was telephoned and the services provided explained as follows:

‘Good morning Doctor. We are [the agency], we publish the [agency] NHS directory, you are probably familiar with it – it is known as the [named] book. We also own and regularly update our NHS Online personnel directory service which can be found at [a website] which currently contains details of over 500,000 NHS personnel.

This is a secure facility, accessible after we have verified your status. Then after you have completed the registration process the system will send you your user name and password. Of course any information you give us will not be shared with third parties.

[The agency] will from time to time send details by email about our affiliates’ products and services relevant to your area of specialization, such as educational [emails] on disease areas, along with information from certain government agencies, such as the DVLA, Royal College of Nursing and other professional bodies. These may include updates on specialist services, conferences and seminars, medical, pharmaceutical and promotional materials as well as official information. Is this OK? Good, what is your email address and would you confirm your job title’.

A follow-up email then re-iterated the telephone conversation and asked the health worker to confirm that they would like to access data held on the website through an access code. This was verified yearly and a copy of the email was provided.

Goldshield submitted that an unsubscribe/opt-out response option was provided at the bottom of each educational email by the agency. The agency assured Goldshield that this was received and checked daily and usually implemented within forty-eight hours (except weekends). A copy of the opt-out response was provided.

The complainant was first telephoned in September 2007 and emailed shortly after. Since then, the

complainant had received nine electronic transmissions – seven educational emails from pharmaceutical companies (including an earlier one sponsored by Goldshield in September 2007), one from the DVLA and another from NHS Choices. Throughout this period, although provided with the option to opt out of the services provided by the agency the complainant had declined to do so. In addition to this, the agency had told Goldshield that 179 requests were received during this period to unsubscribe from their services; less than 1% of the emails sent.

Goldshield submitted that it had acted responsibly in this matter and therefore was not in breach of the Code, however it regretted any distress and inconvenience caused to the complainant.

PANEL RULING

The Panel noted that Clause 9.9 prohibited the use of email for promotional purposes except with the prior permission of the recipient. The Panel considered that the email on MacroBid was clearly promotional material. Whilst it had not been sent directly by Goldshield it was nonetheless an established principle under the Code that pharmaceutical companies were responsible for work undertaken by third parties on their behalf.

The Panel also noted the script used on the telephone: health professionals were told that the agency would, from time to time, send details by email about its affiliates’ products and services which might include updates on specialist services, conferences and seminars, diagnostic, medical, pharmaceutical and promotional materials as well as official information. The text did not make it abundantly clear that the company intended to send promotional material from pharmaceutical companies; the text referred to pharmaceutical **and** (emphasis added) promotional materials as if the two were wholly separate. Furthermore, the text referred to ‘affiliates’ of the agency. In the Panel’s view pharmaceutical companies were not affiliates of the agency, and would not be seen as such. Pharmaceutical companies would be purchasing a service from the agency. Similar text appeared in the subsequent confirmatory email.

The Panel considered that the email had been unsolicited. There was no evidence to show that the complainant had given prior, fully informed, consent to receive by email promotional material from a pharmaceutical company. A breach of Clause 9.9 was ruled.

APPEAL BY GOLDSHIELD

Goldshield submitted that the complainant was telephoned and emailed by the agency in September 2007 about his interest in the services it provided. Both forms of communication clearly stated that the agency would from time to time

email details on its 'affiliates' products and services and that these might include updates on pharmaceutical and promotional materials. The wording 'pharmaceutical and promotional materials' made abundantly clear the type of services provided by the agency.

Goldshield disagreed with the Panel's comments that the text referring to pharmaceutical companies as 'affiliates' of the agency was incorrect. Webster's dictionary defined affiliate as being 'closely associated with another typically in a dependent or subordinate position' and although Goldshield had sponsored the material sent to the complainant, it was in a 'subordinate position' in that the material was written independently by writers provided by the agency.

Goldshield further submitted that not only did the complainant give his permission on two different occasions – in the first instance when he gave the agency his email address and secondly by email, when he logged onto the agency database site using a verification code before registering – he was provided with nine opportunities between September and December 2007 to opt out of the services provided by the agency, all of which he declined.

Goldshield noted that Clause 9.9 of the Code stated that 'the telephone, text message, email, telemessage, facsimile, automated calling systems and other electronic data communications should not be used for promotional purposes except with prior permission from the recipient'. Goldshield submitted that it had acted within the Code (both by telephone and email) and had not contacted the complainant without his permission.

COMMENTS FROM THE COMPLAINANT

The complainant alleged that in essence Goldshield submitted that its communication was reasonable because it had been told by the agency that he had 'opted in' to receive promotional material. The complainant had not done so, and the agency had never telephoned him to ask if it could send him educational/promotional material. The reason he had protested about being sent unsolicited promotional emails was exactly because it was unsolicited. The agency had telephoned the complainant stating that its records showed he had been telephoned and had consented to this information being sent, however this was incorrect.

The complainant submitted that Goldshield did not have to simply accept his word that the agency had sent unsolicited commercial promotional emails, one of his medical colleagues confirmed that she had been receiving unsolicited educational emails from the agency. She also denied that she had been telephoned by the agency to consent to receive this information. (The other doctor emailed the Authority separately to confirm these facts).

The complainant stated that Goldshield could believe either its agent (which clearly had a vested interest in denying its behaviour was unacceptable) or the account from two GPs with no vested interests in this matter at all, other than the hope that the agency would be instructed to desist.

APPEAL BOARD RULING

The Appeal Board noted that the parties' accounts differed; it was difficult in such cases to know exactly what had transpired. A judgement had to be made on the available evidence and the balance of probabilities.

The Appeal Board noted that no documentation specific to the complainant was provided by Goldshield to support its position that he was telephoned and had given his fully informed and explicit permission for pharmaceutical promotional material to be sent to his email address.

The Appeal Board noted Goldshield's submission that on nine occasions the complainant had declined to opt out of the service. The Appeal Board disagreed with the company's view that this implied a positive action on the complainant's part to ensure continued receipt of emails.

The Appeal Board noted that the complainant alleged that he had received an unsolicited email promoting MacroBid. His colleague's submission did not refer to Goldshield but lent some support to his position given that she stated that she had also received unsolicited emails from the agency.

The Appeal Board considered that on the balance of probability the email received by the complainant had been unsolicited. The complainant had not given prior permission to receive the promotional material by email. The Panel's ruling of a breach of Clause 9.9 was upheld. The appeal was thus unsuccessful.

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The Authority subsequently reported Goldshield to the Code of Practice Appeal Board in accordance with Paragraph 11 of the 2006 Constitution and Procedure because the company failed to provide the requisite undertaking and assurance in relation to the Appeal Board's ruling of a breach of the Code.

COMMENTS ON THE REPORT FROM GOLDSHIELD

Goldshield stated that it had some serious manufacturing issues with respect to a range of products and had to spend a huge amount of time resolving these with the Department of Health and the Medicines and Healthcare products Regulatory Agency. This had placed considerable strain on the whole company.

Goldshield stated that its reservations about the findings related to the issue about whether the email was unsolicited. As the sign up process had included telephone contact and an online sign-up which included the words 'pharmaceutical and promotional' in the statement to which the doctor had agreed and the doctor had had several opportunities to opt out and had not taken these, then Goldshield found it very difficult to understand how the email could have been considered as SPAM. Goldshield was happy to accept that the wording could be made even clearer.

In addition, Goldshield also felt very frustrated as it had gone to some lengths to check that all the proper sign up procedures were being used when it selected the agency.

Goldshield submitted that as it had always endeavoured to comply with the Code it had given an instruction that the company should not use the agency until such time as it had a statement that could be considered clear and acceptable. This had now been undertaken.

Goldshield stated it would always make the best efforts to comply with the Code and it had had an internal review to strengthen its procedures in this respect. An amended form of undertaking had

been signed.

APPEAL BOARD CONSIDERATION

The Appeal Board was very concerned that Goldshield had not provided the requisite undertaking within the time set out in the Constitution and Procedure (Paragraph 10.2). The form should have been provided by 16 May. Goldshield had stopped the activity in question but had not provided the undertaking until 14 July 2008. The Appeal Board noted that the company was not a member of the ABPI but it had agreed to comply with the Code and accept the jurisdiction of the Authority. The Appeal Board decided that as in effect Goldshield had not continued to use material in breach of the Code it would not take further action at this stage. It expected the company to comply with the Constitution and Procedure in the future otherwise it could no longer be included on the list of non members that complied with the Code.

Complaint received	25 January 2008
Undertaking received	14 July 2008
Case completed	16 July 2008
