

Domain Name Commissioner
Level 11
80 Boulcott Street
PO Box 11-811
Wellington 6142

Attention: Debbie Monahan

7 June 2016

Email: policies@dnc.org.nz
VIA EMAIL ONLY

Our Ref: DEK 167138NZMS

Dear Debbie

Contacts:

**Baldwins Intellectual Property
Review of the WHOIS Service by the New Zealand
Domain Name Commissioner – Round Three**

Penny Catley - Team Leader, Partner
Deborah Kessell-Haak – Senior
Associate
Anna Bargh - Associate
Alex Coats - Team Administrator

We refer to the second request for submissions in relation to the review of the WHOIS policy and how it operates.

The following constitutes submissions made on behalf of Baldwins Intellectual Property.

Executive Summary

We have reviewed a number of the submissions made to the Domain Name Commission ("DNC") and note that a number of submissions have expressed an opinion that the proposed system of withholding registrant data should not be accepted. Instead they propose that all registrant data should be withheld based on what appears to be generalised privacy concerns. On that basis, we consider that it is important to restate our position that such ideological concerns should not outweigh the need for the WHOIS database to be an enforcement/protection tool.

As detailed in our previous submission, therefore, we submit that:

1. There is a need for open access to WHOIS data to protect all users of the internet.
2. The importance of a generalised desire to be free of unwanted correspondence at minimal cost should not, therefore, be conflated so that it outweighs the importance of enforcing legal rights to the benefit of all internet users.
3. Along with common sense, there are cost effective and technically effective protective mechanisms other than non-publication of WHOIS data that may be used to protect WHOIS data from abuse. On the other hand, the costs associated with attempting to

enforce legal rights become excessive and truly burdensome noting that intellectual rights holders can be small vulnerable businesses or individuals as well.

4. Unless, therefore, there are genuine privacy or data protection concerns, the burden of freedom from unwanted correspondence should be borne by the registrant and not those trying to enforce legal rights.
5. The current method of collation and display of WHOIS data should, therefore, remain in place unless there are special circumstances justifying non-publication of collated data.
6. A right to non-publication of WHOIS data should only be allowed in those rare circumstances where non-publication is required to protect a truly vulnerable non-commercial registrant.
7. In this regard, we support in principle the proposed model for the withholding of registrant data only where there is a genuine and persuasive need to do so, i.e. where a non-commercial registrant is truly vulnerable.
8. We disagree in some respects with the DNC's proposal as to requests for access to that information. We resubmit that access to such information should be granted to law enforcement officials and legal representatives where they make an application on oath that the data is needed for legitimate dispute resolution/enforcement reasons.
9. In addition, we consider that there is a need for a right of appeal in relation to any decision to release/continue to withhold information. A lack of ability to appeal would, in our opinion, be a breach of a number of natural justice principles and eventually undermine the general public's faith in the process.
10. We consider that the above model strikes the appropriate balance between genuine privacy concerns and the needs to maintain open access for protection/enforcement reasons.

Previous Submissions

The questions posed by the Commissioner in this round of submissions are largely concerned with the actual proposed model whereby registrant data could be withheld. We note that a number of submissions continue to express a generalised dissatisfaction with the underlying principle that data should be generally available. In this regard, we request that the Commissioner consider all our previous submissions on WHOIS policy where the rationale for such a system is discussed in full and as summarised above.

In particular, we would like to emphasise that assuring and maintaining the accuracy of information obtained from registrants is paramount to the success of the WHOIS database for all of its technical and protective functions. Enforcement of intellectual property rights is often hampered as a rights holder using the WHOIS service is repeatedly faced with parties who have deliberately provided inaccurate information. If, therefore, the purpose of the WHOIS service is expressly acknowledged to have an enforcement or protection purpose, then it is important to ensure that the data collated is accurate and that this accuracy is maintained especially where the registrant's contact details are withheld.

In our opinion, a lack of accountability for the proper management of the WHOIS service is a major flaw. The current system makes the violation of intellectual property rights easy and the evasion of responsibility even easier through the provision of inaccurate data. Any review of the information collected and access to WHOIS data must, therefore, address this issue. We remain concerned that this need for accuracy with the concomitant need for appropriate enforcement measures to maintain such accuracy has not been addressed by the Commissioner to date.

Withholding Registrant Data

We repeat all previous submissions made on the rationale for having accessibility of information as the default status of the WHOIS database.

Support in Principle

We support in principle the model proposed by the DNC for cases where the registrant data should be withheld in the case of genuine need.

As noted in our previous submissions, possible concerns with this approach are essentially costs, consistency and integrity. However, we consider that this model strikes the appropriate balance between accessibility, enforcement and privacy concerns without the relevant parties incurring large costs. Those that have a genuine need for protection, and not just a desire to avoid spam or a purely ideological privacy concern, will be so protected without additional undue burdens being placed on them.

However, we emphasise that the applicability of the opt-out scheme should be strictly limited to those that are truly vulnerable. The system should not, in our opinion, be extended to situations where a party is simply concerned over the consequences of placing certain information or opinions on a website without having a genuine need to keep their information private. In general, such parties are already adequately protected by other legislation in place in New Zealand including, for example, whistle blower protection and human rights legislation.

Seeking Release of Information

We are, however, concerned with the DNC's proposal that it will be the final arbiter of any request for a release of withheld information without any right of appeal.

We note that if the accuracy of the registrant's contact details are maintained and the registrant is actively communicating with our clients in order to resolve any dispute through the identifier@privacy.dnc.org.nz contact system, then the only reason our clients will be seeking such information is if the dispute cannot be resolved amicably and our client is placed in a situation where it must serve court proceedings. Alternatively, our clients would seek such redress if a registrant fails to communicate with our clients. If either of these events occurs, our clients will have a genuine need to have contact details, including a postal or physical address, in order to comply with the rules surrounding the commencement of court proceedings and the service of documents. If it cannot comply with these rules (requiring service at a physical or postal address), then it would need to seek orders allowing substituted service. Not only is substituted service an administrative and cost burden on a plaintiff it may possibly act to the detriment of a defendant whose details are being withheld as they may not be aware of the substituted service.

So that the integrity of both the WHOIS database system and the New Zealand court system are maintained, it is vitally important that any decisions made by the DNC in this regard are transparent and subject to testing by way of a right of appeal. We note that the same need for transparency and integrity applies in reverse in that the party whose data may be released should have the ability to know why the data is being released and to test that decision, especially as they must have made a good case for withholding the information in the first place.

Overall, a lack of transparency combined with a failure of the DNC to be accountable by way of a right of appeal for any decisions it does make would eventually undermine the integrity of the proposed model in the eyes of all parties. Such an outcome should be avoided and, therefore, we recommend that a right of appeal be instituted in relation to the release of registrant data as well as the original decision to withhold data.

Conclusion

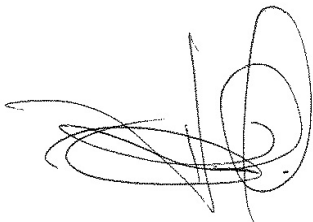
For the reasons outline above and in our previous submissions, we repeat our argument that at an absolute minimum the current system of the collation, display and grant of access to WHOIS data should be maintained.

However, we acknowledge that there may be a genuine need to protect the contact information for truly vulnerable domain holders. We support in principle the model suggested by the DNC in this regard. We highlight, however, that the power to withhold data should only be exercised in cases where there is a genuine and concrete need for anonymity. This ability for anonymity should be combined with an ability to request the data for dispute and enforcement purposes; the decisions as to special circumstances and access to the contact information being decided by a party independent of the registrants and registries as proposed by the DNC. We submit, however, that any decision made pursuant to such a request should be subject to a right of appeal.

Overall we submit that this proposed model strikes the appropriate balance between those that truly need online anonymity and the need for open access to such data for the overall benefit and protection of all users.

Yours sincerely

Baldwins Intellectual Property

A handwritten signature in black ink, appearing to be 'DKH', with a large loop and a horizontal stroke across the bottom.

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