

7 June 2016

*By email*

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

**Attention: Debbie Monahan**

Dear Commissioner

**NZIPA  
Review of the WHOIS Service by the New Zealand  
Domain Name Commissioner – Round Three**

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 the New Zealand Institute of Patent Attorneys ("NZIPA").

**Executive Summary**

In brief we restate our position that when the protective/enforcement function of the WHOIS database is weighed against generalised 'concerns' as to the publication of data (as opposed to a genuine need for anonymity), there is no reasonable justification for a general withholding of data. The interests of vulnerable parties are, we argue, sufficiently addressed in the model currently proposed by the Domain Name Commission ("DNC").

Therefore, the NZIPA supports the proposed model in principle. It has concerns, however, with that aspect of the proposal that states that the DNC will be the final arbiter of any request to access or release withheld data without any right of appeal or review. While we have sympathy with the DNC's apparent concern that the process of requesting a release of information should not be expensive or unduly lengthy, we consider that this aspect of the proposal may be a breach of natural justice principles. As such, the NZIPA submits that there should be a right of appeal in relation to any decision by the DNC to either maintain secrecy or to release contact information subsequent to a request to release such data.

**The Protective Function**

We note that a number of submissions currently before the DNC in relation to the proposed model have expressed a generalised privacy concern and then stated on the

basis of that concern that all registrant data should be withheld. The justifications for this position appear to be that registrants are naïve and do not know that their data is available or that the online environment is dangerous and registrants should be protected by withholding all contact details. In addition, a number of the current submissions state the onus and costs of seeking contact details should be on the parties seeking such details.

In this regard we express our support in principle for the position taken by the DNC in relation to its current proposal as to the operation of the WHOIS database. As stated in our previous submissions, the function of the WHOIS database should be expressly acknowledged to include a law enforcement/protection purpose in order to maintain the stability and security of the DNS and to enable the appropriate enforcement of national laws in the online environment. It follows that to promote that purpose the data collated needs to be accurate and readily accessible. In addition, this purpose requires that a balancing exercise be undertaken with privacy considerations being weighed against the importance of the protective or enforcement function of the WHOIS service. In this balancing exercise, so long as there is a mechanism available for access to information on the basis of a legitimate enforcement need then the needs of a truly vulnerable registrant should be paramount.

A default position where registrant data is hidden gives a registrant more protection in an online environment than what they actually have in everyday life. An ideological desire for privacy or a concern to be free of unsolicited communications should not outweigh a legitimate need for the enforcement of national laws; especially where the majority of the data collated and displayed is already available from other sources.

### **Withholding registrant data**

In general, the NZIPA supports the DNC's proposal regarding the withholding of registrant information in 'special circumstances'. In addition, it supports the method by which this would be done as set out in the current proposal.

#### Only withhold information on a very limited basis

We reiterate our concern, however, that information should only be withheld in the rarest of situations where a truly genuine need for anonymity has been proven by the registrant seeking such protection and there is no other way of protecting the party in question. To this end, we suggest that such data should only be withheld where there is a genuine risk that a registrant's personal safety would be at risk if their data was released. Any extension of this proposal to situations where there is only a perceived risk of, for example, legal, political or social repercussions due to the contents of a website linked with the domain in question should, in the NZIPA's opinion, be avoided. To grant such an extension would, in the NZIPA's opinion, distort the balance between the protective/law enforcement function of the WHOIS database and the genuine need for registrant privacy.

#### Accuracy

We also express concern that the DNC should be at pains to maintain the integrity and accuracy of any contact information obtained from registrants even when such data is withheld from general publication on the WHOIS database.

The ability to identify and locate infringing offenders, especially repeat offenders, remains a major obstacle preventing the adequate protection of intellectual property rights in an online environment. 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 third parties should always be able to easily contact the holder of a domain name, even if it is through the proposed email identifier@privacy.dnc.org.nz, when there is a concern over the domain name itself or the content within the website associated with that domain.

As the provider of the information may have reason to provide inaccurate information in order to avoid identification, the onus of ensuring the accuracy of the data provided should not vest with them. Instead, the onus on ensuring the accuracy of the information should vest with the party having the means, funds and imperative to impose accuracy. We would submit that the appropriate party is the one that is collecting the information and deriving income from the registration system. They should, we submit, be required to institute proactive checks on the accuracy of information being provided. Mechanisms would then need to be put in place to ensure that this party was free to act in this capacity and to ensure that their compliance was actively monitored and enforced through appropriate sanctions.

#### Potential breach of natural justice principles

While we support the DNC's proposals in principle, we express concern over the DNC's position that it would be the final arbiter of any requests for the release of registrant information without a right of appeal.

While we sympathise with what must be an attempt by the DNC to ensure that the process of requesting the release of data is simple, final and cost effective, we consider that any such approach would be a breach of the principles of natural justice.

In this regard we note that the party requesting the information will most often have not been involved in the process of requesting that such information be withheld and will, therefore, be making a request for contact details on the basis of little or no information. In addition, they will often be seeking the contact data in order to comply with court imposed procedural rules regarding the service of proceedings on the registrant. It is, therefore, vitally important to have that information to maintain the integrity of that process and any associated rules of natural justice without an undue burden being placed on the party seeking to serve such proceedings on the registrant. Transparency as to the reasons why a decision has not been granted in their favour and a right to test that decision are, therefore, important to maintain the integrity of any such decisions.

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. In this regard we fall back on the principle that justice must not only be done but must be seen to be done in order for the process to be as effective and fair as possible.


We submit, therefore, that a right of appeal to any decision made in relation to a request for release of information should be allowed.

### **Conclusion**

For the reasons outlined above and in our previous submissions, the NZIPA supports the DNC proposal in principle. However, a right of appeal in relation to any decision to release/continue to withhold information on request should also be implemented in order to maintain the integrity of the process and the general public's faith that the system is in fact being implemented with integrity.

In addition, we reiterate our recommendation that the DNC should ensure that mechanisms are put in place to ensure that any contact data collected is accurate and remains accurate especially where registrant data is being withheld. NZIPA would, in general, support any amendments to the WHOIS service that would result in an increase in the accuracy of such data along with the implementation and actual exercise of appropriate enforcement mechanisms to support that accuracy.

Yours sincerely

Handwritten signatures of Corinne Cole and Matt Adams. The signature of Corinne Cole is on the left, and the signature of Matt Adams is on the right.

Corinne Cole		Matt Adams
President		Councillor