

8 November 2016

By email

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

Attention: Debbie Monahan

Dear Commissioner

**New Zealand Institute of Patent Attorneys
Review of the WHOIS Service by the New Zealand
Domain Name Commissioner – Round Four**

We refer to the fourth 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 proposed by the Domain Name Commission ("DNC") in previous rounds; withholding the information of vulnerable registrants who have shown a genuine need for such protection.

Therefore, the NZIPA does not agree with either of the proposed options for withholding information as they are inadequate to address the concerns of intellectual property owners. In our submission, any move to restrict information in the way proposed by the DNC is a move too far in favour of the registrant.

If in the event the DNC does proceed with the proposal of only providing partial information, in order to offset what will be a serious impact on intellectual property owners, any system of providing access to that information should be very simple, provide for a



rapid turn around and be completed at no cost to the party seeking to access the information.

1. Which of the two options proposed for withholding WHOIS information do you prefer and why?

The NZIPA does not support either option as neither is adequate to address the concerns of intellectual property owners fighting infringement and fraud perpetuated on consumers in an online context.

2. If you prefer neither option, what other solution do you think would balance individual registrants' WHOIS privacy with their accountabilities as .nz domain name holders?

We reiterate our previous submissions noting that most parties that have made publicly available submissions have expressed only generalised privacy concerns and then stated on the basis of that concern that 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 contact details. In addition, the DNC notes in the background to the proposals that:

Contact address has the most impact on a registrant's privacy. It's also the area that everyone we spoke with acknowledged was **their main concern around personal safety. It's not cheap or simple to change a contact address and not every individual registrant has access to an alternative address they can use aside from their residential one. [emphasis added]**

As stated in all our previous submissions, however, 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. For the purposes of the enforcement function, ready and rapid access to a name and a contact address to allow for the proper and efficient service of documents is vital.

While the NZIPA acknowledges that a balancing exercise is required, the current position taken by the DNC whereby most contact information will be withheld on the basis that a potential registrant self-declares an 'individual' status is weighted far too strongly in favour of the registrant. In an environment where infringement of intellectual property rights is prevalent and growing, any process that prevents or delays the enforcement of legitimately held intellectual property rights will prolong the harm, increase the damage incurred and increase associated enforcement costs to the holder of the right. For example, the unauthorised copying and transmission of works in which copyright is held can occur very rapidly and it can become very difficult for a rights holder to claw back such unauthorised transmission within an extremely short space of time. A delay in contacting an infringing registrant, even if only 24 hours, could be very damaging and quickly become exorbitantly expensive for a rights holder.

It also encourages those who seek to breach national laws with an easy means to withhold their data without any appropriate balances or checks being added to ensure their claim to anonymity is legitimate. For example, an individual registrant may be holding a domain for a company or organisation, which we would submit to be a very common practice in New Zealand, without any legitimate reason to claim a 'privacy' right but will still be able to request the data be withheld on the basis that they as the registrant are an individual. In addition, individuals can claim anonymity even where they are acting publicly and/or commercially online and, therefore, their right to full anonymity should be tempered in order to be subject to legitimate scrutiny. In other words, if you choose to act in such a public manner, you should expect and plan for the fact that your generalised 'privacy' concerns will be subjugated to law enforcement requirements.

In addition, those that seek to use the online environment for illegitimate purposes will simply lie. Without significant penalties for an incorrect declaration and a very robust and rigorous means of ensuring that registries check all such declarations for accuracy, an action we submit that a large number of registries that seek to compete on the basis of the lowest possible registration costs would be highly reluctant to complete, the protective function of the WHOIS database is eroded for no legitimate reason.

We further note that intellectual property rights are not solely held by large companies with ready money available to protect their rights. A large number of New Zealand businesses are small to medium concerns or sole traders for which the costs associated with enforcement of intellectual property rights is very onerous. It would, in our opinion, be fair to state that those costs and any associated increase in those costs or any damage incurred through enforcement delays far outweighs the costs associated with securing an alternative contact address as a simple and practical 'self-help' measure to address generalised safety concerns.

A default position where registrant data is even partially hidden on the basis of a simple declaration 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 and the registrant is operating publicly.

Therefore, taking into account all of the NZIPA's previous submissions, at a bare minimum a name, a contact address and email address should be displayed where:

- There are no concrete safety considerations as opposed to a generalised concern as to safety (an exemption on these grounds being sought in advance as previously submitted).
- The registrant, regardless of whether they are acting commercially or as an individual, is operating publicly in an online environment.
- The registrant is operating in an environment where businesses are required to provide physical addresses and contact details that are publicly available, including online, and where even residential addresses and phone numbers are routinely made available by those same parties now professing safety concerns.

- The 'self-help' options noted in our previous submissions are significantly less onerous, both from an administrative and a cost basis, than the consequences that would be imposed on rights holders should information be routinely withheld.

In other words, the NZIPA supports the DNC's proposal as detailed in round 3 of this review.

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, a generalised breach of privacy, legal, political or social repercussions due to the content 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.

3. Under what circumstances, and to whom do you think it would be appropriate to release withheld WHOIS information?

If in the event that the DNC opts to withhold information on a more general basis, an outcome that the NZIPA vigorously objects to for the reasons outlined above, then intellectual property rights holders, regardless of whether or not the intellectual property is registered or unregistered, who can show a simple *prima facie* case of potential intellectual property right infringement should be able to access the information.

4. What process do you think would work best in releasing withheld WHOIS information?

Principle 11(a) of the Privacy Act 1993 provides that:

An agency that holds personal information shall not disclose the information to a person or body or agency unless the agency believes, on reasonable grounds –

- (a) **that the disclosure of the information is one of the purposes in connection with which the information was obtained or is directly related to the purposes in connection with which the information was obtained**
[emphasis added]

The NZIPA highlights that the immediate release of information by the DNC is entirely consistent with Principle 11 of the Privacy Act 1993 in a situation where the collation of that information is expressly acknowledged to be for enforcement purposes. An active and national education program should be entered into by the DNC to ensure that all current and potential registrants are aware of this purpose and that their information will be released unless, as detailed below, they request an exemption in advance.

The NZIPA submits, therefore, that:

- Registrants should have the ability to request and be granted a release exemption based on concrete personal safety issues. This can be sought either on an application to register the domain name or, in the event that relevant circumstances arise after registration or the registrant was unaware of the right, after registration on application to the DNC.
- All contact information should be released to any requester upon the receipt of a written request outlining the circumstances of the alleged infringement or other circumstances causing harm to consumers.
- The registrant should be notified of the request. However, unless the registrant has obtained a release exemption as detailed above, the release should be immediate and the registrant should not have the ability to object.
- For reasons outlined in full in previous submissions, being that even individuals acting non-commercially can still breach intellectual property rights, no consideration should be given as to whether the registrant is an individual or is/is not commercially active. It should be enough that the registrant is acting publicly.

The above process would, in our opinion, at least ameliorate some of the concerns of intellectual property rights holders regarding delays to access to information required to adequately enforce their rights.

5. If an individual registrant has an issue with the release of their withheld WHOIS information, or does not respond to a notification, what should happen?

The DNC should have the ability to raise an issue with a request for information on the grounds that no genuine enforcement requirement has been raised.

However, the fact that their information is not automatically publicly available is enough, in the NZIPA's submission, to properly balance a registrant's generalised privacy/safety concerns (as opposed to concrete personal safety concerns) with those enforcement needs detailed by the NZIPA in this and its previous submissions.

To ensure that the burden of protecting a registrant's privacy/safety is not unduly placed on a rights holder through costly and damaging delays, all objections to the release of information should be raised and an exemption on limited special circumstances obtained in advance of a request to release, either at registration if the special circumstances already exist or at a later date on application to the DNC if an issue arises. Potential mechanisms for the implementation and maintenance of such a system are detailed in previous submissions.

As contact details are not automatically published, the above proposal also protects a naïve registrant who may be unaware that their data will be released as it gives them a second chance to seek protection. As an additional protection, registries should be required to actively and prominently warn registrants (i.e. not buried with terms or conditions) of a potential release and a registration should not proceed unless the registrant has acknowledged and agreed to the fact of a potential release.

In the NZIPA's submission, this proposal efficiently deals with the potential for delay and non-compliance in that it avoids the issue entirely by placing some of the burden on registrants to protect themselves. The NZIPA submits, therefore, that this proposal more equitably balances the cost and administrative burden of the protection of privacy/safety as between those parties with opposing views. A registrant seeking non-release on the basis of special circumstances gets multiple opportunities to do so and the registrant with no genuine reason to seek what amounts to anonymity and who may have an illegitimate reason to be as difficult as possible cannot stymie the enforcement of a legitimate right.

Thank you for considering our submissions. If you would like further information or wish to discuss the content of our submissions in any way, please contact me on the contact details below.

Yours faithfully

A handwritten signature in cursive script, appearing to read 'Cole', written in black ink.

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