

WHOIS ISSUES PAPER on Privacy

Presented to the Council on behalf of the WHOIS Task Force

11 March 2003

Transmittal and Background:

The WHOIS Issues Paper on Privacy is a stand-alone document [see comments below on a broader background document] that has been primarily drafted by Marilyn Cade, as co-chair, drawn on the contributions of the Task Force in meetings and previous documents and discussions. While not finally reviewed nor fully debated by all members of the Task Force due to time limitations, the text reflects discussion among several Task Force members on 3/11/03. However, understanding that the Council must have an issues document in order to discuss whether to address an issue, the Issues Report on Privacy is presented to the Council. Task Force members may provide comments on the Issues Report regarding their views. Some Task Force members may chose to contribute separate issues reports, outside of the Task Force. Such contributions may or may not draw on the collaborative work of the Task Force to date.

There are wide ranging views within the Task Force regarding how to address any issues related to privacy; however, there is strong support for ensuring an informed and unbiased consideration of how privacy relates to WHOIS, and vice versa.

Due to the differences of perspective within the Task Force itself, in some cases, issues identified in this Issues Report are presented without complete agreement regarding their priority, nor their inclusion. This should not surprise the Council, given recent discussions related to the WHOIS Task Force Policy Report. The Issues Report is an attempt to identify privacy issues that may be further addressed by the Council through the policy development process or presented for further study by some other mechanism, such as an advisory group or other groups.

The Task Force members have also been collaborating on a document which draws together the previous discussions and work related to exploration of privacy. It has been the intent of the Task Force to make this available to Council as a background document. However, this document is not yet completed, and cannot be provided within the 14-day requirement of the Council prior to a Council meeting; it will be a made as a supplemental contribution from the Task Force prior to the ICANN Rio meeting for informational purposes. Some commitments to contributions are still outstanding and have unfortunately, delayed the development of the background document.

Two other Issues papers are submitted separately by the Task Force and address other issues identified by the Task Force.

The Issues Paper on Privacy draws on the full range of experiences of the broadest number of Task Force members, the extensive and full dialogue within the Task Force, the document under development, and contributions from other contributors throughout the work of the Task Force, including the survey data originally used to seek input related to WHOIS.

The Issues Reports end the work of this WHOIS Task Force. The Issues Reports are presented so that the Council can deliberate on how best to address policy issues in privacy and WHOIS.

WHOIS Issues Paper

From the beginning of the work of the WHOIS Task Force, a number of discussions and inputs have been received regarding the privacy implications of WHOIS access. In mid 2002, The Task Force chose to separate the treatment of accuracy from access, and recommended privacy be treated separately. Some members of the Task Force do not support this approach and have stated so elsewhere. The majority of the Task Force did support this approach. Strong commitment to better understanding and addressing the Issues of privacy have been a part of the Task Force discussions. The purpose of this Issues Paper is to identify the issues that have been identified and to briefly discuss them and to present possible policy actions for consideration by the Council.

This document does not address privacy in all WHOIS databases, such as the IP Registry databases, but is focused on the privacy issues in Registrar and Registry WHOIS. The Task Force acknowledges that questions related to privacy in other databases may be addressed by the Council as well.

This list of issues also does not attempt to focus in on the ccTLD WHOIS; the Task Force acknowledges that there are unique issues related to national law which must be taken into account when discussing WHOIS in ccTLD registrations. The Task Force included ccTLDs in its original survey and benefited from the participation and contributions of ccTLD participants. The Task Force would recommend that as further policy work is undertaken, the ccTLD Supporting Organization should be involved in representing the interests of the ccTLDs, or that in the interim until its launch, the ccTLDs could select representatives as delegates to further policy development, as applicable to the ccTLDs.

Issue 1: What is the purpose of WHOIS data collection from registrants, technical and administrative contacts today; what are the uses of the data, today, and who are the various users?

WHOIS data is gathered by the registrars from the registrants [or their agents] as holders of the domain name; as well as technical contact information and administrative contact information. This data includes a wide range of information that includes name, address, telephone, fax, and email. Other information in WHOIS (Registry level) includes IP addresses for the hosted DNS. The Task Force received comments that understanding the purpose of WHOIS data collection is important to policy development.

The WHOIS Task Force survey identified some of the users of WHOIS data as

- Commercial
- Governmental
- Individual
- ISP
- Non-Commercial
- Other
- Registry/Registrar

The purposes of accessing the WHOIS system were also asked of the Survey respondents and included:

- to determine if a specific domain is unregistered/available
- to find out the identify of a person or organization who is responsible for a domain name or web site I have encountered while using the Internet
- To support technical operations of ISPs or network administrators, including tracing sources of spam or denial of service attacks
- To identify the owner of a domain name for consumer protection or intellectual property protection purposes
- To gather names and contact information for marketing purposes
- To support government law enforcement activities (other than intellectual property)
- Other (Please describe)

The survey is merely a snapshot and provides an illustration for some of the reasons to access WHOIS. It has never been presented as a statistically valid survey. During the Task Force's work, other comments were received which documented these general uses of WHOIS. The survey also identified significant concerns with misuses of the WHOIS data for marketing and other purposes that are of concern to users. Comments also included expressed concern by individuals, privacy advocates, and other commenters about access to the WHOIS data when the data is about an individual registrant.

Section 3.3.1 describes the data to be provided in the WHOIS service of the Registrar.

There is a wide difference of opinion regarding the kinds of registrants that make up the major gTLD registrations. Some believe that the majority of registrations are commercial, organizational, or institutional users of a variety of "sizes"; others believe that a large number of individuals are registered. Some believe that the reason for significant amounts of inaccurate WHOIS data is because individuals are purposely providing erroneous data because they object to having personal data available, for a variety of reasons, while others believe that significant amounts of data from some categories of data have simply "aged". Some believe that many who provide false data are also engaged in fraudulent activities, and are hiding behind the category of "individual registrant".

Before undertaking policy recommendations, an attempt should be made to obtain more information about who registers, and therefore has information in WHOIS, and who uses the data and for what purposes.

A possible policy action would be to establish more clearly a categorization of data users. The exploration should include the importance of providing accurate technical contact information for purposes of security and integrity, based on further advice and consultation from the Stability and Security Advisory Committee. Consideration of relevant policy guidelines from the OECD in both Privacy and Consumer Protection should be taken into account in the development of policy.

Issue 2: There are legitimate needs for public access to registrant data; technical and administrative contact data due to Internet stability issues, consumer protection concerns, policing of trademarks and investigating copyright violations, and ISP/network operators technical concerns. Given these legitimate needs, how can these needs be best met?

Issue 1 lists some, but not all areas that can be examined further as “legitimate” uses of querying the WHOIS database. These are not replicated under this issue but should be considered in full. The Stability and Security Advisory Committee has also provided some comments, which are helpful in this area.

The Task Force has also identified concerns with misuses of WHOIS data. The Task force also has identified that some of its members, and that some in the community believe strongly that absolute rights to anonymity exist. Others in the Task Force believe that there are other considerations, such as engaging in fraud, deception, cyber crime, piracy will present overriding considerations to the right to anonymity.

The Task force notes that the Stability and Security Advisory Committee and some others suggest that there is a critical need for access to registrant contact data that is correct and accurate.

A possible policy action is to explore different ways in which these needs can be met, including 1) continuing the status quo to public access to accurate data in WHOIS 2) exploring tiered access or differentiated/subscriber access 3) providing access without question to law enforcement, but requiring all others to “register” with the registrar. There will be/may be costs for implementing such changes. See Issue 5.

Issue 3: What privacy issues exist in public access to WHOIS:

-Via bulk access;

-Via port 43?

-Via any other arrangement provided by the registrar in bulk access of any kind?

-Via public ability to query the database?

The Task Force identified significant concerns related to marketing uses of the WHOIS data, and provided some policy recommendations to begin to deal with changes in bulk access. The Task Force believes that further work is needed to quickly address access to Port 43 that results in data mining and other misuses of the data. Several comments were received by Registrars and other concerned participants regarding such areas. It also suggests that ways that Registrars may make access to the WHOIS data available to third parties under other arrangements or agreements should be examined and suggests possible needs for restrictions to marketing uses that are not consistent with user preferences.

The question regarding public ability to query the WHOIS data base for individual inquiries for all registrants still remains. Some believe that WHOIS should be completely unavailable to public inquiry, while others think that individual access to single queries, or small numbers of queries is acceptable, as long as no data mining or other misuses occur in the query. Some believe that only those registrants who fit a “special” category should be able to rely on anonymity through a third party. Some believe that there are certain “rights” which would allow anyone to remain or operate with anonymity, regardless of whether they are a business, or enterprise, non commercial entity, or individual. Some suggest that it may be possible to allow query as is provided today, with no change. Others suggest that query should be “tiered” with minimal levels of information provided without a “registration” with the registrar.

Applicable Sections of the Registrar and Registry Agreements must be examined in this process for possible change, based on consensus policy.

A possible policy option is that the obligations contained in the RAA's bulk access provisions (3.3.6) could be removed entirely, or eligibility for RAA-mandated bulk access could be limited to certain well-defined, legitimate uses. Access to WHOIS data provided voluntarily by registrars (and use of such data) could be limited by changes to the applicable contracts.

A possible policy option is to maintain the status quo, identify problem areas, and report to Council regarding areas of concern to guide further policy work.

Issue 3a: The current policy environment provides for the possibility that a third party registers a domain name on behalf of the actual registrant, and makes information about the real registrant available under certain circumstances.

It should be explored to what extent such mechanisms are being offered commercially today, and to what extent they contribute to addressing privacy concerns.

Issue 4: For consideration of privacy of the registrant, privacy concerns of organizational, commercial, or institutional registrants who conduct commerce or communication of some kind with the public could be treated differently than

privacy concerns of those who are registering as individuals. If so, how would the different categories be defined? How would abuses be addressed so that abuses, after documentation, would lead to a change in status?

Today, there is no distinction between the registrants in the gTLDs, with all registrants asked for the same kinds of information (Section 3.3.1-3.3.8). In addition, under Section 3.2, the additional information related to the IP addresses and names of the names servers are also provided by the Registrar to the Registry. It may be appropriate to discuss creating differentiated categories of registrants with different requirements for providing public access to the registration contact information, while still requiring accuracy of Information that is provided.

There have been claims of identity theft and other individual user concerns related to the misuse or abuse of WHOIS data which have created individual instances of stalking, or other unpleasant or frightening incidents, that have been described by privacy advocates and civil society activists. Such concerns are very serious and should not be dismissed. Possible approaches could be to undertake an analysis, which would be both expensive, and create serious time delays. On the other hand, it could just be accepted that such risks may exist.

Many believe that by registering a domain name, the registrant is holding himself or herself out to communicate with the public, and that other means of being online, but remaining anonymous exists, such as use of personal web pages with an ISP or other web hoster, or through intermediaries. Others believe that either national law, such as the United States Constitution, or other applicable law, or laws in other countries, guarantee, or require the availability of “anonymous speech” in any medium, based on the choice of the user. The Task Force is, however, not commenting on legal aspects.

As a possible approach for dealing with these concerns, an anonymous or “unlisted” set of information might be appropriate for individuals, with the registrar holding such data, similar to the “unlisted” numbers in the typical telephony white pages. The telephone company holds the correct data, in the event of legal inquiry, or emergency need to contact. In these instances, the telephone company can receive an emergency request to contact from a family member or other entity, and without disclosing the contact number, can contact the individual to ask if they wish to voluntarily contact the inquirer. Law enforcement can also obtain needed information via legal inquiry.

A possible policy action could be to undertake consideration of whether and how to create different categories of registrants in the open gTLDs, and to explore what implications such decisions would have for restricted gTLDs.

Another possible policy approach would be to maintain the status quo, and ask the ICANN staff to monitor for complaints and problems, and report to the Council.

Issue 5: The current policy environment provides for the possibility that a third party registers a domain name on behalf of the actual registrant, and makes information about the real registrant available under certain circumstances.

It should be explored to what extent such mechanisms are being offered commercially today, and to what extent they contribute to addressing privacy concerns.

Issue 6: If changes in public access to the WHOIS resources are mandated by policy change, will there be costs associated with this change? If so, how should it be funded?

Different views exist about how to deal with funding access to WHOIS overall. The Registrars and Registries have legitimate concerns related to new policy requirements that bring “unfunded” mandates. Users who rely on accurate and accessible WHOIS for a variety of purposes believe that costs of providing basic services should be incorporated in the registration fees and borne by all registrants, as a part of the service to the community and therefore recoverable by the registrars. Some have suggested subscription based services for some categories of users, with others have “free” access for minimal queries. There is yet no well defined agreement on how to fund any changes in WHOIS.

If policy changes are recommended, the full range of implications should be explored, including assessing what the costs would be to registrars to implement differentiated access for different classes of users. Such exploration should include the cost of validation.

Issue 7: Should there be circumstances in which willful provision of inaccurate or incomplete data would not be grounds for possible deletion or other adverse acts? If so, what are those circumstances, and how can it be demonstrated and what safeguards should exist against abuse?

The Task Force heard comments that some may purposely provide inaccurate data or incomplete data as a means to ensure privacy or anonymity.

Based on discussions at the FTC Workshop on Global Fraud, and comments from others, including the OECD and EC, clearly, some registrants provide inaccurate contact details for reasons that are not about protecting personal privacy for legitimate concerns, but for purposes of defrauding the public. In order to protect those who have legitimate concerns, it is also important to have a mechanism to deal with the “abusers” and to change their status and require correction of data.

If the system were changed, via a policy process, to allow or even encourage the willful provision of inaccurate or incomplete data, corresponding changes in the contractual regime will be needed, coupled with safeguards to deal with abuses.

Issue 8: A broad discussion that ensures input from the GAC, and interested international multi-lateral entities, such as the OECD, the Stability and Security

Advisory Committee, the ALAC, the ASO, and the ICANN Board, with the GNSO is needed to further explore the range of issues and questions related to privacy and WHOIS access. Separate discussions and considerations must apply to gTLD WHOIS and ccTLD WHOIS, but where possible, and applicable, ccTLDs representatives and participation should be invited to examine applicable issues, including the development of standards.

Discussions and concerns about privacy and WHOIS are of concern in many other fora, including the GAC and other governmental entities, the ICANN Board, the ALAC, the Stability and Security Advisory Committee, and in the GNSO. WHOIS is important for the stability of the Internet, and the issue of access to the WHOIS data should be treated as a decision that takes into account applicable national law, compliance issues, and requirements for ensuring stability and other legitimate uses. The ccTLDs also have a range of issues related to WHOIS access to data, but national law typically governs them. Since many gTLDs registrars also register in ccTLDs, there is a need to reflect sensitivity to individual requirements. A balanced approach should result from such dialogue that reflects the input of those concerned with privacy, consumer protection, investigation of fraud; and stability of the Internet.

Summary of Comments regarding Privacy Issues and WHOIS:

A balanced approach to considering change is needed, taking into account all perspectives. The consideration of all aspects of the questions and balancing the needs and interests of all may result in: a reaffirmation of the status quo; in a change in who can access WHOIS, how, and under what conditions; in elimination of any kind of marketing uses altogether by limiting contracted, voluntary, or bulk access of any kind to well defined, non marketing purposes; or to no such uses; or ranging from metering of Port 43 to extremely limited access which seems more like query based access with limited inquiries. Other changes could create differentiation of policy among classes of registrants.

The Issues Report is presented to the Council for its consideration how to proceed in addressing privacy in WHOIS.

The WHOIS Task Force members have committed hundreds of hours working together to try to understand concerns, issues and perspectives. We share a common commitment to an effective and useable WHOIS, even where we differ in issues of access to data. We will present our follow up report as a background/resource document.

*Drafted by Marilyn Cade, as co-chair
Based on efforts to summarize other inputs from Task Force*

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