

Comment on; Next-Generation gTLD Registration Directory Services to Replace WHOIS Preliminary Issue Report

Ref to: <<https://www.icann.org/public-comments/rds-prelim-issue-2015-07-13-en>>

This comment on the Next-Generation gTLD Registration Directory Services to Replace WHOIS Preliminary Issue Report is submitted on behalf of the NCSG. It was reviewed on the NCSG DISCUSS list which includes representative of all NCSG organizational members as well as NCSG individual members. It has been reviewed and approved by the NCSG Policy Committee according to the NCSG charter provisions for public statements on policy issues.

We would like to begin by complimenting the author, Marika Konings, on an excellent job compiling all of this material into a 72 page report. While we may choose to emphasize certain issues, we appreciate that this is an excellent and balanced summary of much of the history and elements involved in WHOIS.

Background

Historical and Current WHOIS policy development efforts

The existence of the WHOIS in its current form is in our opinion a legacy that is no longer fit for purpose in a modern privacy conscious world. As noted in the NCSG comments to the Privacy/Proxy Services Accreditation Issues PDP initial report;

“Now the Whois database includes those who would oppose a dictatorial government, condemn an abusive corporate practice, are LGBT in countries where it is illegal, shelter the abused, or seek to share their personal, social, religious and political views. For these individuals, organisations, small businesses and even large corporations, the Whois points a finger at the name, physical address, personal cell phone (often) and email of those engaging in and leading these lives, ideas, challenges and questions.”

The existence and future development of the WHOIS is a point of contention between many areas of the GNSO, each group has different aims and goals at hand and finding consensus on matters of any sort relating to WHOIS is often fraught with difficulties.

NCSG has been active in WHOIS related policy efforts since our inception. We therefore bring to this discussion a great deal of experience in working with the fundamental weaknesses in the current WHOIS. We believe that at a basic level the PDP that is initiated from this Issues Report must concentrate on creating a viable future for managing contact information on registrants and any additional information

that registries and registrars may be required to store. Taking into account the various inputs available to the PDP including but not limited to the EWG report the WHOIS review and the SSAC report on WHOIS, this PDP should be comprehensive in nature and should form the basis of a modern responsive and privacy aware set of policies.

We believe that the Issues Report accurately captures the current status of the ecosystem of policy development that currently exists surrounding the WHOIS.

We wish to underscore a further caveat with the WHOIS PDP, relating to scope. WHOIS has been sliced and diced into any number of procedural and policy development processes over the years, and it has been common to find that vital elements in one process are considered out of scope for a given activity. This cannot happen with the new RDS PDP. One example suffices to illustrate the problem: when the EWG was meeting, they did not discuss the RAA, as it was considered out of scope. Meanwhile, the 2013 RAA was negotiated and it is the data collection instrument for the WHOIS.

EP-WG Framework for a PDP on Next-Generation RDS

We note that the EP-WG Framework provides a detailed and comprehensive plan for the execution of the resulting PDP, however we note with caution that the framework does not specify a timeline for this herculean policy effort. We believe that in order for a comprehensive and workable policy to be constructed that the work of the resulting PDP must be taken at a pace that allows all stakeholders to participate on an equal footing.

Most NCSG members are volunteers who do not receive direct compensation for their work at ICANN and as such may not be in a position to dedicate full working weeks to this effort as may be the case with other stakeholders. When undertaking the high level planning and scheduling exercise ICANN must involve the various stakeholder groups to ensure that a realistic timeline is put in place for this effort. It is fundamentally unfair to assume a pace of work that only certain stakeholders can afford, thus cutting out other elements in our multi-stakeholder process.

The community must be the final arbiter of what constitutes a viable and realistic timeline for the PDP. Specific issues with the report

We recommend that the Issues report deal with the following specific issues:

Issue: Relationship of the PDP with the AOC review of Whois

At the moment, there is a controversy surrounding the incorporation of the WHOIS review as specified in the Affirmation of Commitments into the ICANN bylaws as part of the CCWG-Accountability effort. The issues report should be updated by staff to track the status of any updates to the WHOIS review commitment from the AoC as the work of the CCWG-Accountability progresses.

Issue: Input materials to the PDP

We note that among the input materials there may be conflicts in findings, it will be important for the resulting PDP to take each of these inputs on their merits and reach informed fact-based outcomes during its decision making process.

We believe that the report of SSAC should be held in very high regard by the PDP WG and may form the basis for much of the work, in conjunction with the work of the EWG. Earlier SSAC reports on WHOIS are also well worth re-examining.

Issue: Impact analysis for privacy and other rights

The PDP guidelines include the following possible content, in the request and in the issues report.

What is the economic impact or effect on competition, consumer trust, privacy and other rights:¹

Section 4.5 of the preliminary issues reports includes:

While it may be impossible to fully reconcile opposing views, the PDP must address compliance with applicable data protection and privacy laws, privacy policy for gTLD registration data, and related services applied to registration data. Although the EWG made recommendations in all of these areas, the group was unable to agree upon a principle requiring registrant consent. Privacy/Proxy accreditation work also continues in a separate PDP. Clearly, privacy will be a very challenging but essential area for the PDP to address.²

In order to meet the challenge of privacy and data protection rights, at the conclusion of each phase of the project, a separate rights impact assessment should be performed by a group experienced in the performance of such an impact analysis. As there is currently no ICANN group established to perform such a rights impact

¹ <http://gnso.icann.org/en/council/annex-2-pdp-manual-24jun15-en.pdf> Page 2

² <http://whois.icann.org/sites/default/files/files/rds-prelim-issue-13jul15-en.pdf> Page 44

analysis, independent evaluation by a group of experts including data protection authorities with academic representation could be employed for this purpose.

This requirement should be added to Annex C of the Charter.

Detailed comments on the RDS Issues report

P 4 1.2 The questions from data commissioners over the years regarding the purpose of WHOIS should be interpreted broadly: What is the purpose of the collection, use, disclosure and retention of the registrant data. This was not addressed in the EWG work, and therefore the use cases studied are starting with incomplete assumptions.

“Establishing gTLD registration data requirements to determine if and why a next-generation RDS is needed; “

“requirements” need to be justified. The needs of some users need to be balanced against the rights of others, and the collection, use and disclosure of information must be proportionate. Therefore the expression “establishing requirements” must be construed broadly.

P.25 Report in this list omits the common position on WHOIS, 2000, published by the IWGDPT but referenced and accepted by the Article 29 group.

p.33 the EWG did not start with a clean slate. The RAA negotiations were going on at the same time and were deemed out of scope. The RAA establishes by contract the collection, use, retention and disclosure requirements of the personal information in question, therefore to have it deemed out of scope is not acceptable. Furthermore, the registrants are not a party to the contract nor are they represented in contractual negotiations. The use cases were accepted as legitimate uses. The purpose of WHOIS data was never defined.³ For these reasons and others, it is inaccurate to say that the EWG started “tabula rasa”. This is an important point, as the Issues report includes the staff recommendation to focus on the EWG report. We need to be clear about exactly what that report was, particularly because there were very substantive changes between the draft and final reports, and the final

³A working definition was defined by the GNSO in 20060412-01

The GNSO Council recommends that the WHOIS task force use the following definition:

“The purpose of the gTLD Whois service is to provide information sufficient to contact a responsible party for a particular gTLD domain name who can resolve, or reliably pass on data to a party who can resolve, issues related to the configuration of the records associated with the domain name within a DNS nameserver.”

See also <http://whois.icann.org/en/link/final-outcomes-report-whois-working-group-2007>

report did not receive public comment. As a result, we really do not have a thorough understanding of how the community views the final report. .

P55 Whether the issue implicates or affects an existing ICANN policy.

The goal of the PDP would be to review (and potentially overhaul) the entire existing gTLD registration data policy, including its underlying protocol. Such an overhaul would therefore replace the policy currently in place and might affect other policies, as well as future registry and registrar agreements for gTLDs insofar as they deal with the collection, maintenance and access to gTLD registration data.

As indicated above, numerous issues were out of scope for the EWG. This group must be prepared to examine de novo issues that are raised as the PDP goes along. Notably, the AOC is contradictory in itself, as it is impossible to respect data protection law and constitutional rights, and say in the next sentence, "Such existing policy requires that ICANN implement measures to maintain timely, unrestricted and public access to accurate and complete WHOIS information".

The WHOIS conflicts with law procedure puts registrars in legal jeopardy if they comply with data protection law. There are numerous other examples, where data protection law and constitutional rights are being steadfastly ignored in favour of intellectual property rights. It is time to right this imbalance.