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BY FAX AND MAIL

CIRA WHOIS
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Ottawa, ON K1R 7S8

Re: CIRA PROPOSED NEW WHOIS POLICY

The following comments are provided by the Canadian Internet Policy and Public Interest Clinic (CIPPIC) on the Canadian Internet Registration Authority (CIRA)'s proposed new WHOIS policy.

Under CIRA's proposed new policy,

- For individuals who register a dot-ca domain name, only the domain name, the name of the Registrar, the registration date, the "last change" date, notice regarding changes in status of the domain name and server IP numbers/names will be available through WHOIS. Individual dot-ca domain owners will have the option of making additional information accessible to the general public.
- The policy for organizations – private and public – with dot-ca designations will not change; the same data will continue to be available through WHOIS. Organizations will be able to request that some of their information be kept private.
- CIRA will continue to ensure all registration data – including information not made public under the new policy – is available to law enforcement agencies.

CIPPIC appreciates the opportunity to comment on this important issue, and applauds CIRA for its proposal, as well as for the consultation process that it has followed in the development of the proposed reforms. The questions below are those posed by CIRA in its consultation comment form.

1. Do you support or oppose CIRA's proposed new WHOIS policy? Why?

CIPPIC strongly supports CIRA's proposed new WHOIS policy. The proposed changes are required, in CIPPIC's view, not only for reasons of good business practice, but also in order for CIRA to comply with Canadian privacy law (in particular, the federal *Personal Information Protection and Electronic Documents Act* (PIPEDA)).

Under PIPEDA, organizations in the course of commercial activities are required to ensure the knowledge and consent of the individual to any collection, use or disclosure of that individual's personal information, except in limited, specified circumstances. "Personal information" is defined as "information about an identifiable individual, but does not include the name, title or business address or telephone number of an employee of an organization". The automatic and mandatory publication of individual registrant contact information via the online WHOIS database does not meet any of the criteria for exceptions to this rule under PIPEDA, and therefore violates Canadian law, in our view.

Even if the changes were not required by law, CIPPIC submits that they are necessary in order to protect the legitimate privacy interests of individuals and organizations who hold dot-ca domain names, as well as to eliminate the contribution that widespread availability of personal contact information via WHOIS makes to increased spam, online fraud, and chilling effects on free speech. As CIPPIC stated, along with numerous other consumer and civil liberties groups in a letter to ICANN dated 23 October 2003,¹

"The WHOIS database was originally intended to allow network administrators to find and fix problems to maintain the stability of the Internet. It now exposes domain name registrants' personal information to many other users for many other purposes unrelated to network access. Anyone with Internet access can now have access to WHOIS data, and that includes stalkers, governments that restrict dissidents' activities, law enforcement agents without legal authority, and spammers. The original purpose for WHOIS should be reestablished.....

Users of domain names have a legitimate and reasonable expectation of privacy. There are many users, particularly in the non-commercial world, who have valid reasons to conceal their identities or to register domain names anonymously. Although there are some domain name registrants who use the Internet to conduct fraud or to infringe on other people's or companies' intellectual property rights, we believe that a sensible privacy policy for WHOIS must protect the legitimate privacy expectations for domain registrants.

First, for domain name registrars to compel registrants to disclose personal information, even information related to domain registration, poses dangers to freedom of expression and privacy on the Internet. Many domain name registrants--and particularly noncommercial users--do not wish to make public the information that they furnished to registrars. Some of them may have legitimate reasons to conceal their actual identities or to register domain

¹ <http://www.thepublicvoice.org/news/whoisletter.html>

names anonymously. For example, there are political, cultural, religious groups, media organizations, non-profit and public interest groups around the world that rely on anonymous access to the Internet to publish their messages. Anonymity may be critical to them in order to avoid persecution.

Second, WHOIS data should not be available to just anyone who happens to have access to the Internet. It is well known that broad access to personal information online contributes to fraud such as identity theft. US Federal Trade Commission (FTC) advises consumers to protect themselves from identity theft, and generally from Internet-related frauds, by not disclosing personally identifiable information. The mandatory publication of WHOIS data is contrary to the FTC's advice."

It is also recognized that the widespread availability of email addresses via the WHOIS database contributes to spam. In the context of the international effort to combat spam, it is incumbent on CIRA, as on other organizations, to limit the accessibility of email addresses to spammers. At a minimum, individual registrant contact information should not be made available to spammers.

2. In your view, what are the main strengths of the proposed new WHOIS policy?

In CIPPIC's view, the main strength of the proposed policy is its balancing of two important, but competing, sets of interests.

There is great value in the transparency and accountability that is currently served by the widespread public availability of contact information for dot-ca domain name holders. Consumers, for example, can use the WHOIS database to find out who is responsible for a questionable e-commerce website. Domain name holders can find out who has registered other domain names similar to their own, in order to seek a transfer of such names. Internet users can find out who is behind a website that expresses controversial opinions.

However, that interest in transparency and accountability must be weighed against the privacy interests of domain name holders and their agents, as well as against the public interest in reducing spam, online fraud, and chilling effects on free speech.

CIPPIC believes that the CIRA proposal reflects an appropriate balance between these two sets of interests. Contact information about individual registrants will still be available to law enforcement officials, but only in response to specific requests, as permitted by law. It will also be available to plaintiffs alleging civil wrongs (e.g., defamation, copyright infringement), once such plaintiffs have

established the legitimacy of their claims, by way of a court order. Those seeking to challenge the rights of an individual registrant to a given domain name can still do so under the CIRA Dispute Resolution Policy (CIRA will provide the contact information to the relevant dispute resolution provider, if a domain name is subject to a dispute proceeding). And finally, contact information for most organizational registrants will remain public, reflecting the much lesser privacy interest attached to most business contact information, as well as the significant public interest in transparency and accountability of organizational websites.

Moreover, CIRA's proposed policy permits an appropriate level of flexibility so as to accommodate legitimate registrant desires. Individual registrants are free to make their contact information public via WHOIS, if they so desire. Organizational registrants have the right to request that their contact information be kept private, and to have that request considered on its merits by CIRA.

Finally, CIRA's proposed policy includes notification to registrants, unless prohibited by law, of disclosures of that registrant's personal information to third parties. Such notification is an important element of due process, as well as fair information practices.

Another aspect of the new policy that CIPPIC strongly supports is the prohibition by CIRA of certain uses of WHOIS data – in particular, the use of the WHOIS service to harvest email addresses for purposes of marketing, market research, and other solicitation activities (s.6.1.5). It is important that CIRA explicitly limit the permitted uses of publicly available WHOIS information, in order to send a clear message to users, as well as to be able to pursue abusers.

3. What are the main weaknesses of the proposed new WHOIS policy?

CIRA's proposed policy, while permitting organizations to request non-publication of their contact information, does not indicate the grounds on which such requests will be granted. It should do so. As CIRA recognizes, some organizations may have a legitimate interest in keeping their contact information private. Many individuals engage in human rights, political, and other valuable work through small organizations who are themselves targets of persecution and harassment. Such organizations need to be able to protect the confidentiality of their own contact information.

It should also be noted that the PIPEDA definition of "personal information" includes contact information for anyone, with the sole exception of "the name, title or business address or telephone number of an employee of an organization". CIRA's proposed policy of continuing to publish the contact information for organizational registrants may violate PIPEDA in two respects.

First, the automatic publication in the WHOIS database of e-mail addresses for organizational contacts may not be permitted. In a recent finding, the Privacy

Commissioner of Canada interpreted the PIPEDA exception cited above as *not* including business e-mail addresses. In other words, according to the Privacy Commissioner of Canada, business e-mail addresses *are* personal information and must be protected as such. This finding is not legally binding, and may not withstand judicial review. Nevertheless, it is the most authoritative determination of the status of business e-mail addresses under PIPEDA that we currently have. If CIRA wishes to comply with the Privacy Commissioner's views on this issue, it should not publish the e-mail addresses of employees of organizational registrants without their explicit consent.

Further, the above-noted exception to the definition of "personal information" is limited to "employees" of organizations. Many organizational registrants use contractors or other non-employees as their administrative and/or technical contacts for purposes of domain name registration. The contact information for such individuals may therefore be considered "personal information" under PIPEDA, and thus subject to the same requirement for consent as applicable to individual registrants.

4. What changes, if any, would you recommend CIRA make to its proposed new WHOIS policy? Why?

i) CIRA should specify the criteria that it will apply in deciding whether to grant an organizational request for non-publication of registrant contact information. Such criteria should be just and reasonable. Organizations can thus be assured CIRA's discretion will be exercised fairly.

ii) Section 7 of the proposed policy, addressing "Accuracy and Retention", should provide more specifics regarding registrant obligations to confirm the accuracy and completeness of their WHOIS information, the potential consequences of providing inaccurate information, and the process applied by CIRA to requests for such confirmation. Alternatively, this section of the new policy should reference section 7 of CIRA's "General Registration Rules", which sets out such obligations and process.

iii) We assume that the standard "Registrant Agreement" will be revised so as to reflect the new WHOIS policy, once adopted. Article 4 of the Registrant Agreement currently requires registrants to consent to the disclosure to third parties through the Registry of their contact information.

Using the scale provided below, please indicate the extent to which you support or oppose specific elements of the proposed new WHOIS policy as well as the policy overall.

	Strongly support	Somewhat support	Somewhat oppose	Strongly oppose
a) The proposed new WHOIS policy overall	X			
b) Keeping contact details private for Registrants that are individuals	X			
c) Voluntary opt-in process for individual Registrants that want to make contact details publicly available	X			
d) Requirement that contact information be publicly available for Registrants that are not individuals		X (as long as (e) also provided, with fair criteria)		
e) Ability of Registrants that are not individuals to request that their contact information be kept private	X (assuming fair exercise of discretion by CIRA)			

Thank you again for the opportunity to comment on this important new policy.

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