

**GNSO PRIVACY & PROXY SERVICES ACCREDITATION ISSUES (PPSAI) PDP
WORKING GROUP**

**PRELIMINARY CONCLUSIONS & DRAFT LANGUAGE TO DATE ON
CATEGORY F – REVEAL
2 November 2014**

Charter Questions:

1. What, if any, are the baseline minimum standardized reveal processes that should be adopted by ICANN-accredited privacy/proxy service providers?
2. Should ICANN-accredited privacy/proxy service providers be required to reveal customer identities for the specific purpose of ensuring timely service of cease and desist letters?
3. What forms of alleged malicious conduct, if any, and what evidentiary standard would be sufficient to trigger a reveal?
4. What safeguards must be put in place to ensure adequate protections for privacy and freedom of expression?
5. What circumstances, if any, would warrant access to registrant data by law enforcement agencies?
6. What clear, workable, enforceable and standardized processes should be adopted by ICANN-accredited privacy/proxy services in order to regulate such access (if such access is warranted)?
7. What specific alleged violations of the provider's terms of service, if any, would be sufficient to trigger publication of the registrant/owner's contact information?
8. What safeguards or remedies should be available in cases where publication is found to have been unwarranted?
9. What are the contractual obligations, if any, that if unfulfilled would justify termination of customer access by ICANN-accredited privacy/proxy service providers?

WG Preliminary Conclusions:

I. Recommended Definitions

The WG's review of a sample of P/P service provider policies as well as of prior ICANN work on this issue indicates that there is currently no consistent, universally-accepted or well-understood single definition of "Reveal" as the word is used by the ICANN community. The WG has developed the following definitions to cover the two aspects of what a "Reveal" request is commonly understood to mean, and recommends that ICANN adopt these definitions in its P/P Service Provider Accreditation Program, and in any relevant contracts and related policies:

"Publication" means the reveal of a person's (i.e. the licensee or beneficial owner of a registered domain name) identity/contact details in the Whois system.

"Disclosure" means the reveal of a person's (i.e. the licensee or beneficial owner of a registered domain name) identity/contact details to a third party requestor without Publication in the Whois system.

The term **"person"** as used in these definitions is understood to include natural and legal persons, as well as organizations and entities.

The WG also agreed that there may be a need in certain circumstances to differentiate between a request made by law enforcement authorities (LEA) and one made by other third parties such as intellectual property rights holders or private anti abuse organizations. In proposing certain recommendations concerning requests made by LEA, the WG notes that a definition of LEA appears in the 2013 RAA (see <https://www.icann.org/resources/pages/approved-with-specs-2013-09-17-en>) and recommends adopting the same definition in the ICANN Accreditation Program, and in related contracts and policies:

"Law enforcement authority" means law enforcement, consumer protection, quasi-governmental or other similar authorities designated from time to time by the national or territorial government of the jurisdiction in which the P/P service provider is established or maintains a physical office¹.

II. General Recommendations on Publication and Disclosure

The WG reviewed the Publication and Disclosure practices of several P/P service providers, some of whom are represented in the WG. Most providers reported using a manual rather than an automated system to deal with Disclosure requests, in the sense

¹ This is based on the wording of Section 3.18.2 of the 2013 RAA.

that an employee initially reviews a request prior to a decision being made on whether to comply. For at least one provider, its policies and practices were intended to encourage the requestor and the customer to deal directly with each other as far as possible.

The WG agreed that none of its recommendations should be read as being intended to alter (or mandate the alteration of) the prevailing practice among providers to review requests manually or to facilitate direct resolution of an issue between a requestor and a customer. We note that disclosure of at least some contact details of the customer may in some cases be required in order to facilitate such direct resolution.

The WG has not yet finalized a conclusion on whether to recommend uniform minimum standards for providers to apply in determining when to Disclose or Publish, or in verifying a requestor's identity.

The WG agrees that there can be significant differences between the consequences of Publication of a customer's details in the public Whois system compared to Disclosure of the same details to a single third party requestor. Specifically, the WG agrees that there may be a greater need for safeguards to ensure customer protection with respect to Publication than with respect to Disclosure. **The WG therefore recommends that accredited providers should indicate clearly in their terms of service when referring to Publication requests (and their consequences) and when to Disclosure requests (and their consequences). The WG further recommends that accredited providers expressly include a provision in their terms of service explaining the meaning and consequences of Publication.**

The WG notes that several providers currently include in their terms of service or other published policies provisions pursuant to which the provider may Disclose or Publish a customer's details, or suspend or terminate service to a customer. Possible circumstances include where action is required by legal process such as court orders, subpoenas, or warrants, by ICANN Consensus Policy or by Registry requirements. Occasions also may arise in the course of resolving third party claims involving the domain name or its uses, including where necessary to protect property or rights, the safety of the public or any person, or to prevent or stop activity that may be illegal or unethical. **Without mandating that such specific provisions be included in an accredited provider's terms of service, the WG nonetheless recommends that accredited providers should indicate clearly in their terms of service the specific grounds upon which a customer's details may be Disclosed or Published or service suspended or terminated².**

² The current P/P Specification in the 2013 RAA requires that P/P providers who are, or who are Affiliated with, Registrars post their terms of service either on their, or on their Affiliated providers' websites, including the circumstances under which they terminate service and when they reveal or disclose the customer's identity and details: see Section 2.4 of the Specification: <https://www.icann.org/resources/pages/approved-with-specs-2013-09-17-en#privacy-proxy>.

The WG further recommends that, in deciding whether or not to comply with a Disclosure or Publication request, providers not mandate that the requestor must have first made a Relay request.

III. WG Recommendations Specific to LEA Requests

[TBA – including whether accredited providers must comply with express LEA requests not to notify a customer, whether there should be mandatory Publication for certain types of activity e.g. malware/viruses or violation of terms of service relating to illegal activity, and what (if any) remedies there can or should be for unwarranted Publication]

IV. WG Recommendations Specific to Other Third Party Requests

[TBA – including whether accredited providers must comply with express requests for Disclosure for the purpose of sending cease and desist letters or notices of formal legal proceedings against the customer, and whether customer notification in such cases is to be mandatory]

Note: See Section VII, below, for additional draft language under discussion by the WG and relating to requests from IP owners, proposed at the WG's facilitated session on 10 October. Note also that the WG may need to further discuss the need for specific standards relating to requests from other types of third parties (e.g. anti-abuse groups).

V. WG Recommendations on Customer Notification and the Availability of Alternative Options

The WG recommends that accredited providers should indicate clearly, in their terms of service and on their websites, whether or not a customer: (1) will be notified when a provider receives a Publication or Disclosure request from a third party; and (2) in the case of Publication, whether the customer may opt to cancel its domain registration prior to and in lieu of Publication.

VI. WG Recommendations on Requestor Notification

The WG recommends that accredited providers should indicate clearly, on their websites and in all Publication or Disclosure-related materials, that a requestor will be notified in a timely manner of the provider's decision: (1) to notify its customer of the request; and (2) whether or not the provider agrees to comply with the request to Disclose or Publish.

VII. WG Recommendations on Categorizing Third Party Requests and the Use of Standard Request Forms

The WG's review of provider policies shows that least one provider has in place distinct policies dealing specifically with different types of claims for which a Disclosure request is made, e.g. UDRP Filings, Trademark & Copyright Infringement Complaints, and Subpoenas (Civil and Criminal). The WG believes that such categorization can be a voluntary best practice to be recommended to providers, but does not presently recommend mandating this as a requirement for the Accreditation Program.

Nonetheless, the WG recommends that ICANN's Accreditation Program include a requirement for all accredited providers to include on their websites, and in all Publication or Disclosure-related policies and documents, a link to a [standardized] Request Form or an equivalent list of specific criteria that the provider requires in order to comply with such requests.

VII. Proposed Draft Language relating to Disclosure to Third Party Requestors who are Intellectual Property Rights Holders or Legal Representatives Thereof

- Provider to notify customer when it receives a Disclosure request relating to an "IP complaint stated with great specificity, including the identity of the IP rights holder and complainant, the right(s) involved, and the nature of the infringing activity"³.
- There should be a period (of X number of days?) for the customer to take action in response to the notification. This may take the form of a direct response to the requestor, a request to cancel its domain name registration, file with a court or other actions.
- Provider [may] [shall] proceed to Disclose if customer does not take responsive action within the specified time frame (but how would provider know that customer has done so? Perhaps require that customer acknowledge receipt of the notification and its intention to take action?)
- Any such Disclosure should be subject to reasonable limitations on the use of such Disclosed information.

Additional suggestions - create a list of illustrative examples or "build out" a use case for such requests

³ The quoted language in this paragraph was supplied by a WG member.