

Recommendation Of The Board Governance Committee
Reconsideration Request 12-2
3 July 2012

On 7 June 2012, the GNSO Intellectual Property Constituency (IPC), through its President, Steve Metalitz, submitted a reconsideration request (“Reconsideration Request” or “Request”) to the Board Governance Committee (“BGC”). The Request asked the Board to reconsider its 6 May 2012 resolution granting the Registry Services Evaluation Process (RSEP) request of the registry operator for .CAT, Fundació PuntCAT, to amend the .CAT Registry Agreement by changing .CAT’s Whois data requirement (RSEP Request). Specifically, the IPC asks that the Board reconsider its decision and deny Fundació PuntCAT’s RSEP Request.

I. Relevant Bylaws.

Article IV, Section 2.2 of ICANN’s Bylaws states in relevant part that any entity may submit a request for reconsideration or review of an ICANN action or inaction to the extent that it has been adversely affected by:

- (a) one or more staff actions or inactions that contradict established ICANN policy(ies); or
- (b) one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information.

The Bylaws do not provide for reconsideration where “the party submitting the request could have submitted, but did not submit, the information for the Board’s consideration at the time of action or refusal to act.” Bylaws, Art. IV, § 2.2. Similarly, the Bylaws do not provide for reconsideration of an action or inaction of the ICANN Board that was taken after the Board’s consideration of material information. Bylaws, Art. IV, § 2.2(b).

When challenging a Board action or inaction, a request must contain, among other things, “a detailed explanation of the material information not considered by the Board and, if the information was not presented to the Board, the reasons the party submitting the request did not submit it to the Board before it acted or failed to act.” Bylaws, Art. IV, § 2.6(h).

Dismissal of a request for reconsideration is appropriate if the BGC finds that the requesting party does not have standing because it failed to satisfy the criteria set forth in the Bylaws. Bylaws, Art. IV, § 2.16. These standing requirements are intended to protect the reconsideration process from abuse and to ensure that it is not used as a mechanism simply to challenge a decision with which someone disagrees, but that it is limited to situations where the Board did not have access to information that, if available, may have resulted in a different decision.

The Request was received on 7 June 2012, making it timely under the Bylaws. Bylaws, Art. IV, § 2.5. The Bylaws require that the BGC publicly announce by 7 July 2012 its intention

either to deny the Reconsideration Request or to proceed to reconsider the decision that is the subject of the Request. Bylaws, Art. IV, § 2.9.

II. Background.

On 5 October 2011, Fundació puntCAT, the Registry Operator for the .CAT sTLD, submitted an RSEP request seeking to change the Whois requirements for the .CAT registry. According to Fundació puntCAT, the requested changes were in response to European Union legislation on data protection, as adopted by the Spanish Data Protection Authorities. The requested change removes the mandatory publication of personal data of individuals, instead allowing each individual to determine whether his/her personal data will be included in the public Whois listing for a .CAT domain name registration. The change does not have an impact on the information that is actually provided to the registry. The RSEP Request was processed under the RSEP procedures, and can be tracked at <http://www.icann.org/en/resources/registries/rsep>.

In line with the RSEP procedures, on 20 January 2012, Fundació puntCAT's request was posted for public comment. The public comment box is available at <http://www.icann.org/en/news/public-comment/cat-whois-changes-18jan12-en.htm>. Five comments were received in total, including one from Fundació puntCAT. One of the five comments, submitted by the IPC, was in opposition to the .CAT Whois RSEP Request. The IPC's comment is available at <http://forum.icann.org/lists/cat-whois-changes/msg00000.html>. The other comments supported the requested change.

On 6 May 2012, the Board considered Fundació puntCAT's RSEP Request and approved the amendment to the .CAT Registry Agreement to implement the requested change. The Board's resolution (2012.05.06.02) is available at <http://www.icann.org/en/groups/board/documents/resolutions-06may12-en.htm#1.2>. The resolution was accompanied by a rationale statement, which stated:

ICANN's stakeholder relations, legal, and technical teams reviewed the RSEP proposal for competition and DNS stability issues and found none.

According to the Registry, this service is endorsed by law enforcement and data protection agencies representatives from Catalonia, Spain and the EU, as indicated in the RSEP annexes.

puntCAT notes that the GAC communiqué issued on March the 28th, 2007 states the following:

"2.2 The GAC recognizes that there are also legitimate concerns about...conflicts with national laws and regulations, in particular, applicable privacy and data protection laws"

(http://gac.icann.org/system/files/GAC_28_Lisbon_Communique.pdf)

ICANN held a public comment period from 20 January 2012 to 10 February 2012. During this time, the puntCAT proposal received four comments, three in support and one, from IPC, in opposition. The summary of the comments is available below.

Fundacio PuntCAT has conducted consultations with relevant data protection agencies representatives from Catalonia, Spain and the EU, as well as informal consultations with experts on the subject. The relevant authorities named by puntCAT are: the Art. 29 Working Group; the independent EU Advisory Body on Data Protection and Privacy; the Spanish Data protection Authority; and Catalan Data Protection Authority.

Per Fundació puntCAT, this request is the direct consequence of an increase in data protection concerns in the .cat community. The concerns have been directly addressed to Fundació puntCAT throughout many registrants' petitions to allow private whois, as well as a general trend in the data protection fora that have specifically dealt with the subject. In that regard, see the documents referred above.

Registrars were consulted and informed in a meeting held on April 14th, 2011, between puntCAT and its registrars. The meeting had the whois system change proposal as one of its main topics, and none of the registrars attending the meeting had any objections to the proposal.

The proposed amendment was submitted for public comment support and one in opposition from the IPC. In its reply to IPC concerns, the PuntCAT registry continues to affirm that the proposed changes are in alignment with how the data protection framework must be interpreted when addressing the challenges posed by the Whois system. It also states that "the language used by the Spanish data protection Agency is, in our understanding, clear enough to proceed with the changes as proposed. puntCAT believes it would be a severe irresponsibility not to allow us to proceed with the changes. Delaying or, even worse, preventing puntCAT from abiding by the data protection regulation would put the Registry in a very risky legal situation, from which serious economic liabilities could derive."

In the past, ICANN received and, after public comment, approved a similar request from Telnic Ltd, the .tel registry. See: <http://www.icann.org/en/registries/rsep/index.html#2007004>. Telnic is similarly situated, i.e., subject to European privacy law.

III. Stated Grounds For The Reconsideration Request.

The Request is brought on multiple grounds:

- Failure to consider that the change was not necessary to comply with Spanish Data Protection Laws;
- Failure to conduct due diligence on the registry's assertion of support from law enforcement authorities;
- Violation of the Affirmation of Commitments in allowing a change to Whois that was not necessary to be in compliance with national laws;
- Failure to consider an follow the process for resolving conflicts between Whois and national privacy laws, which would have resulted in a narrower solution; and

- Board resolution increases the scope of the change requested by the registry.

For each of the grounds, the IPC presents reasons it believes that the decision should be reversed. The IPC does not identify any reasons why it did not submit any material information to the Board prior to action.

1. Failure to Consider IPC Arguments That Change Not Necessary

The IPC argues that the information available to the Board demonstrated that, prior to the Board's decision, the .CAT Whois requirements were already in full compliance with the Spanish data protection law, and that Fundació PuntCAT's assertions otherwise were without foundation. The IPC made this argument in its public comment.

In trying to distinguish prior similar RSEP requests, the IPC noted that while the Board previously approved changes to the .NAME and the .TEL Whois policies, "the risk of [] a conflict [between the UK data protection laws and the contractual obligations] was both the main motivator of the registry request, and a significant factor in the Board's decision to approve minor changes in each registry's Whois policies." The IPC argues that no such risk existed for .CAT. The IPC points to the Spanish Data Protection Agency's 4 September 2009 statement that "It should be noted that the processing currently being carried out by the inquirer and by the "registrars" applying for domain name registration in favor of the applicant is not contrary to Organic Law 15/1999.... The current situation does not involve a violation of the data protection regulations by the inquirer."

The IPC goes on to argue that, although the IPC raised this objection in public comment, the Board "did not consider the merits of any of the issues," instead looking to confirm that Fundació puntCAT had provided a response to the challenges raised. The Board cited in its rationale that "PuntCAT continues to affirm that the proposed changes are in alignment with how the data protection framework must be interpreted." The IPC claims that the Board "allow[ed] itself to be confused by the registry's advocacy" and never considered the core issue of whether this change was "required" by law, as opposed to merely consistent with the law.

2. Failure to Conduct Due Diligence on Endorsement by Law Enforcement

While the IPC notes that it is appropriate for the Board to consider the position of the relevant law enforcement agencies in evaluating the request, the IPC claims that the Board should have requested documentation from the registry regarding the positions taken by the law enforcement agencies. The IPC notes that it has "been repeatedly advised that the .CAT Whois proposals have not been endorsed or approved" by the Spanish national law enforcement agency or the regional police. The IPC states, therefore, that the assertion in the rationale that the change is "endorsed by law enforcement and data protection agencies" is unsupported.

3. Granting the Request Violates the Affirmation of Commitments

The IPC cites to Section 9.3.1 of the AoC, under which ICANN commits to enforcing existing Whois policy subject to applicable laws. "Such existing policy requires that ICANN implement measures to maintain timely, unrestricted and public access to accurate and complete Whois information." (AoC, at 9.3.1.) The changes to the .CAT Whois requirements, according

to the IPC, would remove timely, unrestricted public access to those who opt out of the publication. The IPC states that this “turns the policy of public access to registrant contact data on its head.” Particularly here, the IPC claims, where the agency has deemed that the current state of the .CAT Whois requirements does not violate national law, there is no justification for “doing the opposite of what the AoC requires.”

4. Narrower Limitations Could Have Been Established Under Existing Processes

The IPC cites the Procedure for Handling Whois Conflicts with Privacy Law, available at <http://archive.icann.org/en/processes/icann-procedure-17jan08.htm>, as the process that should have been followed for the consideration of Fundació PuntCAT’s RSEP Request. The IPC notes that “a review under this process would likely have concluded that, as the Spanish Data Protection Agency concluded, the status quo . . . is consistent with Spanish law.” At minimum, the IPC believes that “process would have resulted in a resolution that, unlike puntCAT’s proposal, preserve puntCAT’s ability to comply with its contractual Whois obligations.” The IPC further notes that ICANN’s “ignoring” of the procedure “reflects poorly on its commitment to the bottom-up consensus process.”

5. The Board Resolution Adopts Changes Broader Than Requested

The IPC claims that the language included in a whereas clause of the resolution “adopts an even more sweeping change in Whois policy than the registry sought.” However, even if the language in the Board’s resolution mirrored the “opt-out” language in Fundació PuntCAT’s request, that system would still “not [be] justified.” The scope of the Board’s resolution “reflects a fundamental flaw in the process that requires reconsideration of the entire decision.”

IV. Request for Stay.

The IPC requests a temporary stay of the Board’s action pending the Reconsideration process. If a stay is not granted, the IPC claims that the suppression of Whois data will undermine the accountability and transparency in the domain name system.

V. Analysis of the Request.

The BGC has determined that the Request fails to state any grounds that support reconsideration of the Board’s 6 May 2012 decision. Accordingly, we recommend that the Reconsideration Request be denied and that the decision on 6 May 2012 not be reconsidered.

As a preliminary matter, the IPC frequently mentions that the Board approved a change to the .CAT Whois requirements that is broader than Fundació PuntCAT’s request, having the effect of preventing all the contact data of individuals from appearing in the Whois search. (See Section III.5 above.) The IPC appears to take this reading from the whereas clause that states “approving the proposal would prevent puntCAT domain registrants who are individuals to have their contact information from appearing in the puntCAT Whois when their domains are queried.” The language of the whereas clause is cited by the IPC as demonstration of a “fundamental flaw” with the entirety of the process. However, the actual proposed amendment to the Registry Agreement is much more limited, and the Board had the draft amendment before it at the time of

the vote. Specifically, the Proposed Appendix S revisions include a default for publication of the individual’s information in Whois queries, and requires an affirmative opt-out in order to remove publication – fully in line with the request from the Registry. The truncated description within the whereas clause does not alter the effect of the proposed contract.

1. IPC Fails to Identify Material Information That the Board Did Not Consider

As to the remainder of the IPC’s arguments, they do not identify any material information that the Board failed to consider; instead, the IPC notes how it would have liked the Board to have weighed the information available and in so doing, attempts to create standards for reconsideration that do not exist within ICANN processes.

As discussed in section III.1 above, the IPC states a belief that the change to the .CAT Whois requirements should not have been introduced because there was no contradiction with current law. Notably, the Board did not identify a conflict with law as a basis for its decision. The IPC, however, wanted the Board to give additional weight to the fact that Fundació puntCAT was able to comply with current law and essentially ignore the other material provided by Fundació puntCAT. Fundació puntCAT’s documentation, collected over a period of years, includes a statement by the Spanish Data Protection Agency that “the solution offered . . . appears to be *more appropriate* than that which currently exists. . . . [T]he solution proposed in the inquiry is considered to be more respectful of the norms and regulating principles of the fundamental right to the protection of personal data than the currently existing solution.” (Emphasis added.)

The Board had access to all of the documentation and used its judgment to make a decision. The IPC does not identify any material information that the Board failed to consider. A reweighing of the facts already before the Board is not a proper grounds for reconsideration and is simply a request that the Board reach a different result based on the same information previously available to it.

Neither is the imposition of new standards a ground for reconsideration. Here, the IPC seeks to create a de facto standard that changes to a registry’s Whois requirements can only be implemented if there is a direct and actual conflict with laws or regulations, and only through the Procedure for Handling Whois Conflicts with Privacy Law, which requires a contracted party to already have a Whois proceeding initiated against it in order to invoke the Procedure.¹ (See Section V.4, above.) Fundació puntCAT was not – as far as ICANN is aware – subject to any proceeding and therefore could not have invoked the Procedure. However, a documented, community-created process was available to Fundació PuntCAT – the RSEP process. ICANN does not impose a requirement that its contracted parties have to be in actual violation of a law prior to seeking a change to a contract; the RSEP process exists so that registries can innovate. Here, the innovation was to a “more favorable” method of dealing with the publication of an individual’s information within the .CAT Registry, without forcing the Registry to be found in conflict with a national law or regulation.

¹ Step one of the Procedure requires “notification of a Whois proceeding.” The .TEL and the .NAME amendments to Whois were introduced prior to the implementation of the Procedure, so the use of the RSEP process was the only method available to request a change.

The IPC also seeks to create a new standard for the Board to perform “due diligence” and seeks documentation of the positions of varying law enforcement authorities when considering RSEP requests. (*See* Section III.2, above.) This obligation does not exist and cannot serve as a grounds for reconsideration. Further, the IPC’s Request confirms that it did not provide – nor does it have – documentation showing that law enforcement agencies did not endorse Fundació puntCAT’s proposal. The IPC only notes its belief of the position of law enforcement. The documentation before the Board, however, belies the IPC’s assertions. The Board reviewed the RSEP Request that contained a letter from the Spanish Data Protection Authority noting the favorable nature of the proposal, as well as an email from the Data Protection Unit of the European Commission. There was nothing in the record to indicate that Fundació puntCAT’s proposal was unfavorably viewed by law enforcement agencies. In the 3.5 months between the opening of the public comment and the Board decision, no other law enforcement authority or government provided comment or noted that advice would be forthcoming through an appropriate channel. It is not ICANN’s role to go out and solicit any potential source of comment outside of the public comment process. Indeed, that is why there is a public comment requirement in the RSEP.

Likewise, the IPC has not identified any material information that the Board failed to consider in relation to the Affirmation of Commitments. (*See* Section III.3, above.) The ICANN Board takes its commitments under the AoC very seriously, and suggestions that the AoC is not being followed are not taken lightly. Under the Board’s decision, the default for individual Whois output in the .CAT registry remains unchanged – public availability is the default.² To the extent that individuals are authorized to opt out of the public availability portion, their ability to do so is in line with a “more appropriate” and “respectful” process as determined by a national data protection agency.

2. Analysis of Request for Stay

At the time that the Request was received, the contractual amendment had not yet been sent to Fundació puntCAT for execution. Because this is a contractual amendment, if ICANN were to enter the amendment and later decide to reverse the 6 May 2012 action, ICANN could then be subject to a breach of contract action. Accordingly, we understand that Staff elected to not change the status quo and not enter into the amendment prior to the BGC’s determination on the Reconsideration Request.

VI. Recommendation.

The BGC believes that the Reconsideration Request fails to state any grounds that support reconsideration of the Board’s 6 May 2012 decision. Accordingly, we recommend that the Request be denied and that the decision on 6 May 2012 not be reconsidered. The BGC does, however, recommend that the Board clarify one of the whereas clauses in front of resolution

² Even where individual subscriber information is not publicly available, the proposed Amendment explicitly reserves that “[t]he Registry will offer access to the full data of individuals that have chose[n] non disclosure to law enforcement agencies” (*see* Proposed Appendix S.) To the extent that the IPC’s RSEP Request is based upon law enforcement’s ability to obtain registrant data, concerns of access have already been considered and addressed within the proposal.

2012.05.06.02 so as to avoid any appearance of having granted a broader revision in the .CAT Registry Agreement, than was requested or approved.