



Internet Corporation for Assigned Names and Numbers

ICANN Generic Names Supporting Organisation

GNSO Council Report to the ICANN Board

Recent GNSO Policy Development Activities on WHOIS

15 November 2007

GNSO Council Report to the ICANN Board

WHOIS

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1. ABSTRACT

This is the Generic Names Supporting Organization (GNSO) Council's Report to the ICANN Board on the pending policy development process on WHOIS.

In June, 2005, the GNSO Council convened a WHOIS Task Force to address a number of important questions related to WHOIS. Key questions set forth in the Terms of Reference included the purpose of WHOIS service, which information should be available to the public, how to improve WHOIS accuracy and how to deal with conflicts between WHOIS requirements and relevant privacy laws. The Terms of Reference established by the GNSO Council to launch the WHOIS Task Force is posted at:

<http://gns0.icann.org/policies/terms-of-reference.html>.

In 2006 the WHOIS Task Force completed work on the first two terms of reference, defining the purpose of WHOIS and developing a draft procedure for addressing conflicts between WHOIS contractual requirements and national or local privacy laws. Regarding the term of reference defining the purpose of WHOIS, on 12 April the GNSO Council approved the Task Force provided definition with 18 votes in favor. The recommendation regarding WHOIS contractual requirements was approved by the ICANN Board on 10 May 2006, and the Board directed staff to develop and publicly document a procedure for dealing with such conflicts, taking into account the advice of the GNSO and any other Interested ICANN supporting organization or advisory committee.

The WHOIS Task Force then completed its final report on 12 March, 2007. The Final Task Force Report addressed the three remaining items in the Terms of Reference, as follows:

- To define the purpose of the WHOIS contacts (registered name holder, administrative and technical contacts);

- To determine what data collected should be available for public access and how to access data that is not publicly accessible; and
- To determine how to improve the process for notifying a Registrar of inaccurate WHOIS data, and the process for investigating and correcting inaccurate data.

In the course of deliberation on these questions, several Registrars offered a proposal called the Operational Point of Contact (OPOC). Under OPOC, every registrant would identify a new operational point of contact and the registrant's postal address, city, and postal code would no longer be displayed. The operational point of contact's name and contact information would be displayed instead, and it would replace the administrative and technical contacts. In case of an issue with the domain name, the OPOC would contact the registrant to resolve, or to reliably pass on data to resolve, operational issues relating to a domain name. In the Final WHOIS Task Force Report, a simple majority of members of the WHOIS Task Force endorsed the OPOC proposal.

Expanding on that work, the GNSO Council in March created a WHOIS working group to examine three issues and make recommendations on them:

1. To examine the roles, responsibilities and requirements of the OPOC, and what happens if they are not fulfilled;
2. To examine how legitimate interests will access unpublished registration data; and
3. To examine whether publication of registration contact information should be based on the type of registered name holder (legal vs. natural persons) or the registrant's use of a domain name.

The [working group's report](#) was published on 20 August 2007. The GNSO Council requested that staff prepare a draft Overview of GNSO WHOIS Activities Final Report by 13 September and a final Overview thereafter. This

document and Staff Implementation Notes on the 20 August WHOIS Working Group Report were submitted to the GNSO Council on 11 October 2007.

See: <http://gns0.icann.org/drafts/gns0-WHOISwg-report-staff-implementation-notes-11oct07.pdf>. Public Comments were invited on all documents from 13 September through 30 October, 2007 (see summary in Section 3(c) below).

On 31 October 2007 the GNSO Council took up the issue of WHOIS and considered the conclusions of the March 2007 WHOIS Task Force Report and the 20 August WHOIS Working Group Report, as well as the Staff Overview of Recent WHOIS Activity and Staff Implementation Notes and all Public Comments received from 13 September through 30 October. Specifically, the GNSO Council considered three motions related to WHOIS. These motions, and the action taken on each, are summarized as follows and described further in Section 3 below:

1. Ask staff to propose an implementation of OPOC that takes into account the work done in the TF, the WG and the comments received in response to that work. The GNSO Council rejected this motion. The final vote was 7 councilors supporting, 17 councilors opposing and one abstention. Two GNSO Councilors were not present during this vote.
2. Postpone further decisions on OPOC until after a series of WHOIS studies being investigated by staff are completed. This motion was modified by members of the Council prior to Council consideration. As approved by the Council, this motion expressly terminates the pending WHOIS PDP. In addition, the Council will provide greater definition on the scope of studies to be initiated, and staff will provide costs on various components of the studies by 15 February, 2008. Following those steps, the Council will decide which studies should be pursued and staff will implement those studies as directed. This motion was approved with 17 supporting, 7 opposing and one abstention. Two GNSO Councilors were not present during this vote.

3. Recommend that the ICANN Board consider “sunsetting” the WHOIS requirements in the Registrar Accreditation Agreement due to the lack of consensus if motion #1 does not pass. This motion was rejected with 10 councilors supporting and 13 opposing. Three GNSO Councilors were not present during this vote.

2. BOARD REPORT REQUIREMENTS

According to the GNSO's policy development process, the GNSO Council's "Board Report" must contain the following elements:

- a. A clear statement of any Supermajority Vote recommendation of the Council;
- b. If a Supermajority Vote was not reached, a clear statement of all positions held by Council members. Each statement should clearly indicate (i) the reasons underlying each position and (ii) the constituency(ies) that held the position;
- c. An analysis of how the issue would affect each constituency, including any financial impact on the constituency;
- d. An analysis of the period of time that would likely be necessary to implement the policy; [Note: this is incorporated into the preceding summary of constituency impacts, since there was no majority support to implement any change to existing policy]
- e. The advice of any outside advisors relied upon, which should be accompanied by a detailed statement of the advisor's (i) qualifications and relevant experience; and (ii) potential conflicts of interest; [Note: no input was provided by outside "advisors" per se. The Board Report does include a summary of the Public Comments received, including those of numerous practitioners, scholars and commercial and noncommercial users from around the world, reflecting a diverse body of expertise and thought.]
- f. The Final Report submitted to the Council; see <http://gns0.icann.org/drafts/icann-staff-overview-of-WHOIS11oct07.pdf>
- g. A copy of the minutes of the Council deliberation on the policy issue, including all opinions expressed during such deliberation, accompanied by a description of who expressed such opinions. See Section 3(e) below.

The remainder of this Report contains the Board Report on WHOIS, which includes:

- a. A description of each motion considered by the GNSO Council, including implementation considerations and affects on constituencies;
- b. GNSO Councilor position statements;
- c. A summary of Public Comments received from 13 September through 30 October 2007, prepared 31 October 2007;
- d. A link to Staff Overview of Recent GNSO WHOIS Activities (Final Report) submitted to the GNSO Council on 11 October and the Staff Implementation Notes on the WHOIS Working Group Report; and
- e. A copy of the minutes of the GNSO Council deliberation from 31 October 2007.

3. GNSO COUNCIL REPORT TO THE ICANN BOARD ON WHOIS

Introduction

1. This document is the GNSO Council's Report to the ICANN Board on the Policy Development Process (PDP) on WHOIS, conducted using ICANN's Bylaws and policy development guidelines that relate to the work of the GNSO. This Board Report reflects a comprehensive examination of the Operational Point of Contact, or OPOC proposal first considered by the WHOIS Task Force and subsequently by the WHOIS Working Group
2. The remainder of this Report is structured around the three motions considered by the GNSO Council on WHOIS. The motions and the discussion they reflect (see 3(a) below) have been the subject of numerous public comment periods and intensive consideration across constituencies. Councilor statements are set forth in Section 3(b) and a summary of public comments can be found in Section 3(c).
3. Two concluding sections set forth links to the Staff Overview of Recent GNSO WHOIS Activity and Staff Implementation Notes on the WHOIS Working Group Report (3(d)), and a Copy of the Minutes of the 31 October GNSO Meeting (3(e)).

a. Analysis of Motions

i. Motion # One --

Motion #1 was offered by Avri Doria and seconded by Ross Rader. The text reads as follows:

Whereas the WHOIS Task Force has delivered its report and Whereas the Outcomes report of WHOIS Working Group on OPOC implementation issues has also been released and Whereas the ICANN staff has produced notes on a proposed implementation and Whereas the GNSO constituencies and the larger community have reviewed and commented on both reports and the proposed implementation notes

Resolved:

The GNSO council supports the OPOC recommendation as contained in the Task Force report and requests that the staff consult the report of the Working Group and all follow-on discussions, including comments supplied by the constituencies during the review and by the community during the open review, in creating a proposed implementation of OPOC.

The council further requests that the staff consult with the GNSO and the community at large once it has developed this proposed implementation plan.

MOTION DID NOT PASS

17 Against: Mike Rodenbaugh, Bilal Beiram, Ute Decker, Kristina Rosette, Cyril Chua, Tony Harris, Tony Holmes, Greg Ruth, Jon Bing, Robin Gross, Norbert Klein, (one vote each) Edmon Chung, Chuck Gomes, Cary Karp (2 votes each)

7 votes in favour: Adrian Kinderis, Ross Rader, Tom Keller, (2 votes each) Avri Doria (one vote)

1 abstention: Mawaki Chango

Philip Sheppard and Sophia Bekele absent, did not vote.

Analysis of motion #1

1. Proponents of OPOC saw multiple benefits to implementation of OPOC. OPOC would be an effective way to accommodate the privacy concerns of natural persons and ensure adherence with relevant national privacy laws. Proponents also supported OPOC as potentially reducing the amount of public data that could be used for undesirable purposes such as phishing, spam and consumer fraud.
2. While a majority of the WHOIS Task Force supported implementation of OPOC, as the WHOIS Working Group (WG) considered further how OPOC would work, it identified a number of issues that presented significant implementation challenges. There were a number of areas of agreement, and many other areas that were more problematic and where there was less consensus.
3. The WG agreed on a number of aspects of OPOC. For example, there may be up to two OPOCs; the OPOC may be a registrant, registrar or third party appointed by the registrant; and all registrants (legal and natural

persons) must appoint an OPOC. The OPOC would have a consensual relationship with the registrant and defined responsibilities. The WG also agreed that a requester of unpublished registrant contact information demonstrate, “reasonable likelihood of actionable harm” as a pre-requisite for access.

4. The WG also discussed various mechanisms that might be implemented to improve how OPOC might work or address various aspects of OPOC. Examples include mechanisms to be sure an OPOC’s email is valid, mechanisms to demonstrate affirmative consent by OPOCs, and mechanisms to provide direct access to unpublished data from registrars in certain instances. In each case, mechanisms thought to be essential by some WG participants were rejected by others. Several mechanisms contemplated by the WG were thought to have certain benefits (for example enhancing accuracy or reliability), but also added complexity for registrants, cost to registrars, to business users and to other stakeholders, or that created other potential challenges to OPOC’s implementation, such as time delays for requesters of information.
5. Among the hardest of the remaining issues involves how requesters with a “legitimate” need for unpublished WHOIS data would get access to this data quickly enough, for example in cases of phishing sites, consumer fraud and other instances when time is of the essence. Though the Working Group agreed on certain aspects of access that are significant, such as use of the RAA’s “reasonable evidence of actionable harm” standard, other significant challenges regarding access remain unresolved. In the Staff Implementation Notes of 11 October, staff offered ways in which the GNSO Council might consider implementing OPOC, including a “streamlined” option that might eliminate or minimize any required verification or consent, and accept self-attestation for direct access (from a registrar or registry) in lieu of an automated authentication mechanism, to try to minimize the burdens of implementation. Of

particular concern was the cost and potential delay caused by forms of authentication, as well as a fundamental concern about how to authenticate on such a broad scale. This is one area where the Working Group recommended further study about scalable and cost-effective options. However, various options failed to address the underlying divergence of views around who should have access to unpublished contact information and under what circumstances access should be permissible.

6. Staff also recognized the absence of a contractual relationship between ICANN and the OPOC. If OPOC were implemented, ICANN would have no mechanism to assure compliance or provide recourse. Another “streamlined” implementation of OPOC might limit the entities who may be an OPOC to either a registrant or registrar. In each of those cases there is an existing contractual relationship which could be enforced.
7. Ultimately however, a majority of the GNSO Council rejected OPOC, reflecting the difficulty involved in formulating an implementation of OPOC that would address all stated concerns. As submitted by each constituency in October 2007 (unless otherwise indicated), constituency views on the OPOC proposal can be summarized as follows:
 - a. Commercial and Business Users Constituency – Do not see sufficient justification for abandoning or changing WHOIS, no adequate basis exists to implement OPOC.
 - b. Individual NomCom appointee (Doria) – Supports an implementation of OPOC that does not include a reveal function and that restricts access to unpublished data only to law enforcement on a case-by-case basis. Absent this outcome, supports sunseting existing, non-consensus WHOIS contractual provisions in all registrar and registry agreements.

- c. Intellectual Property Constituency – Oppose adoption of OPOC unless or until an efficient, reliable and speedy alternative mechanism for access is ready to be implemented.
 - d. Noncommercial Users Constituency – Oppose the adoption of OPOC because of reveal function. NCUC supports sunseting existing WHOIS portions of the RAA at the end of 2008.
 - e. Registry Constituency – Generally supports the underlying concepts of the OPOC proposal, assuming sponsored registries retain the ability to determine the eligibility of applicants and as long as access to unpublished WHOIS for legitimate purposes is addressed. The Registry Constituency supports a tiered access mechanism for this purpose.
 - f. ISP Constituency – Do not support adoption of OPOC in its current form. Concerned about insufficient review of alternative approaches (special circumstances and tiered access), the need for speedy access to WHOIS data for anti-cybercrime purposes, and costs and other implementation concerns.
 - g. Registrar Constituency – In its statement submitted as part of the WHOIS Task Force Report of 12 March, the Registrar Constituency expressed support for the OPOC proposal. The Registrar Constituency did not submit a statement during the October constituency comment period prior to GNSO Council action on 31 October.
8. Importantly, also on 31 October, the Government Advisory Committee published a statement on the draft Procedure for Handling WHOIS Conflicts with National Law, as previously requested by the ICANN Board. The GAC statement suggests governmental support for procedures to facilitate the process of assuring compliance with national laws in the future on a case-specific basis. The GAC statement reads as follows:

The GAC welcomes the opportunity to respond to the “draft ICANN Procedure for Handling WHOIS Conflicts with National Privacy Laws”. Due to the complexity of this issue related to the diversity of national policies and procedures among GAC members the GAC does not believe a uniform process is workable and accordingly the interim solution from the GAC’s San Juan communiqué should be the basis of resolving any potential conflict:

... specific cases should be referred to the relevant national government for advice on the authority of the request for derogation from the ICANN gTLD WHOIS policy.

The GAC reiterates its recommendation outlined in the GAC WHOIS principles that a study on uses and misuses of WHOIS data should be undertaken by ICANN and is prepared to contribute to the elaboration of the terms of reference of such a study.

The draft procedure can be found at: http://gns0.icann.org/issues/WHOIS-privacy/WHOIS_national_laws_procedure.htm, and the GAC Statement can be found at: <http://gac.icann.org/web/communiques/gac29com.pdf>

ii. Motion # 2 –

Motion #2 was originally offered by Kristina Rosette and seconded by Mike Rodenbaugh. During the GNSO Council meeting on 31 October, the text of Motion #2 was amended by several council members and subsequently approved.

The text of motion #2 as approved by the GNSO Council is as follows:

WHEREAS;

1. The GNSO Council has recently received the WHOIS Working Group final report <http://gns0.icann.org/drafts/icann-WHOIS-wg-report-final-1-9.pdf> and;
2. The GNSO Council acknowledges that the broad range of stakeholders with interests in this issue has lead to a wide range of views of what the policy issues are and how to best address those policy issues with solutions that can be supported by the consensus of the community, and;
3. The GNSO Council observes that the Working Group failed to reach agreement on several of the key issues identified in the charter of the Working Group, <http://gns0.icann.org/issues/WHOIS-privacy/WHOIS-wg/WHOIS-working-group-charter-16apr07.pdf> and;
4. That broadly, the scope of the issues in this area have evolved substantially over the term of this Policy Development Process since it was originally chartered, and;
5. A comprehensive, objective and quantifiable understanding of key factual issues regarding the gTLD WHOIS system will benefit future GNSO policy development efforts, and;
6. The rights and requirements of natural persons, the legal and business communities, anti-crime and law enforcement and registrars in the areas of privacy, access, enforcement, investigation, consumer protection and research would benefit from future policy development by the GNSO.

THEREFORE, be it resolved that the GNSO Council;

1. Sincerely thanks all of the volunteers, advisors, consultants, staff, stakeholders, observers and constituency participants who have contributed to the GNSO's examination of WHOIS policy over the last four years, and;
2. Formally ends the Policy Development Process on gTLD WHOIS without making any recommendations for specific policy changes to ICANN's Board of Directors, and;

3. Recognizes the demand for future policy development including, but not limited to, ensuring appropriate privacy safeguards for natural persons, lawful access to data for rights enforcement, consumer protection, law enforcement and anti-crime purposes and will immediately initiate the following sequential actions: 1) Council shall provide additional definition regarding the potential data gathering and study requirements 2) staff shall provide the Council with rough cost estimates for various components of data gathering and studies no later than February 15th, 2008; 3) the Council will decide what data gathering and studies would be pursued; and 4) staff will perform the resulting data gathering and studies and report the results back to the Council .
4. May initiate policy development activities in this area, as supported by the findings of the data-gathering and study activities upon their completion.

THIS MOTION PASSED.

17 Votes in favour: Mike Rodenbaugh, Bilal Beiram, Ute Decker, Kristina Rosette, Cyril Chua, Tony Holmes, Tony Harris, Greg Ruth, Robin Gross , Norbert Klein, Jon Bing (one vote each) Chuck Gomes, Cary Karp, Edmon Chung (2 votes each)

7 Votes against: Adrian Kinderis, Tom Keller, Ross Rader, (2 votes each) Avri Doria, (one vote)

1 abstention: Mawaki Chango (one vote)

Philip Sheppard and Sophia Bekele - Absent (one vote each)

Analysis of Motion # 2 --

1. Studies of various aspects of WHOIS have been recommended for many years. In a May 2003 Issues Report on WHOIS, ICANN staff recommended that “additional work [be] done on investigating the factual background, in analyzing interrelationships of the issues, and in more clearly delineating the issues to be pursued. Additional work in these areas should provide the necessary understanding of the circumstances surrounding the uses and misuses of WHOIS, their effects on privacy concerns, and the issues and their inter-relationships. “ See statement of Louis Touton: <http://www.icann.org/gns0/issue-reports/WHOIS-privacy-report-13may03.htm>

2. More recently, in the 28 March Principles Regarding gTLD WHOIS Services offered by the Government Advisory Committee in Lisbon, the GAC recommended that, “The ICANN community, working with other stakeholders, should gather information on gTLD domain name registrations and registrants and how WHOIS data is used and misused. This information should be publicized and used to inform future debate on this issue.” See: <http://gac.icann.org/web/communiques/gac27com.pdf>.
3. The WHOIS Working Group also supported initiation of several studies on WHOIS, including a study of the uses and misuses of WHOIS (see WHOIS WG Report, Section 8).
4. The GNSO Council itself passed a resolution on 6 September requesting that staff initiate several studies of WHOIS, incorporating into its motion the recommendation of the GAC referenced above, as well as additional studies of WHOIS, including an analysis of the proxy services available today.
5. All constituencies support the need for studies to be conducted that would provide additional information on which to guide future policy development priorities. However, while some constituencies support initiation of studies as a necessary precursor to further policy actions, other constituencies urge the implementation of OPOC now, or alternatively the sunseting of non-consensus WHOIS policies in the Registry and Registrar Agreements, in addition to initiation of further studies that may also be of value. These constituencies also raised concerns about the contours of the studies suggested to-date. Several constituencies were concerned about the value of the studies in comparison to the costs and therefore wanted to consider the estimated costs of various studies before making a decision to proceed.

iii. Motion #3 –

Motion #3 was a conditional motion offered by Ross Rader, seconded by Mawaki Chango (may be withdrawn if Motion #1 above was approved)

Text of Motion:

Whereas;

- (i) The GNSO Council has considered the reports of the WHOIS Working Group and WHOIS Task Force, and;
- (ii) That the GNSO Council vote on [Motion #1] failed to produce supermajority or majority support for the recommendations of the report of the Task Force, and;
- (iii) The GNSO Council considers that the results of this vote signifies the continued lack of consensus on the key issues and possible solutions to those issues, both within the Council, the GNSO and between key stakeholder groups, and;
- (iv) The GNSO Council recognizes that there is no standing consensus policy concerning the management of the WHOIS service and data provided to the public through that service by ICANN's contracted commercial operators, the registries and registrars, save and except the WHOIS Data Reminder Policy and the WHOIS Marketing Restriction Policy, and;
- (v) That significant policy must have the support of the Internet and DNS community and without that support, those policies cannot be reasonably implemented or enforced.

Therefore be it resolved;

- (i) That, with regret, the GNSO Council advises the ICANN staff and Board of Directors of the lack of general consensus on the key issues and solutions pertaining to gTLD WHOIS, and;
- (ii) That due to this lack of consensus the GNSO Council recommends that the Board consider "sunsetting" the existing current contractual requirements concerning WHOIS for registries, registrars and registrants that are not supported by consensus policy by removing these unsupported provisions from the current operating agreements between ICANN and its contracted parties, and;
- (iii) That these provisions be sunset no later than the end of the 2008 ICANN Annual General Meeting and;
- (iv) That such provisions will remain sunset until such time that consensus policy in this area has been developed to replace the sunset provisions, at which point they will be eliminated or modified.

MOTION DID NOT PASS

13 Against: Mike Rodenbaugh, Bilal Beiram, Ute Decker, Kristina Rosette, Cyril Chua, Tony Harris, Tony Holmes, Greg Ruth, Jon Bing, (one vote each) Edmon Chung, Chuck Gomes, (2 votes each)

10 in favour: Robin Gross, Norbert Klein, Mawaki Chango, Avri Doria, (one vote each) Adrian Kinderis, Tom Keller, Ross Rader (two votes each)

Cary Karp (two votes) had left at the time of voting.

Total 23 votes

Philip Sheppard and Sophia Bekele absent, did not vote.

Analysis of Motion # 3 –

1. Proponents of Motion #3 support implementation of OPOC as a compromise targeted at protection of personal privacy, enabling compliance with national privacy laws, and limited access for certain important and valuable purposes. Thus, in the absence of Council support for implementation of OPOC, all non-consensus WHOIS provisions in registry and registrar agreements should sunset, reflecting an absence of consensus in the community. Current WHOIS provisions which now require publication of contact data would “sunset”, allowing parties to publish data as they chose, and providing a mechanism by which registries and registrars can assure compliance with relevant national laws.
2. Opponents of Motion #3 cite the uncertainty and negative impact that these contractual changes would have on government and industry efforts to investigate and deter unlawful and undesirable activities involving domain name registrations and registrants.
3. A majority of the GNSO Council rejected Motion #3.

iv. NEXT STEPS

As a result of the GNSO Council's votes on the three motions described above, the Council is not recommending any policy changes to WHOIS at this time. The Council did vote to terminate the pending policy development process on WHOIS and to initiate further studies. For these reasons, this Council Report is being provided solely for the Board's information. Under ICANN's bylaws, the Board need not meet to consider the Report or take any further action at this time, though it may choose to do so. This Report is also intended as a high-level summary reference of the extensive body of work on WHOIS policy engaged in by the community over a considerable period of time, including reference to earlier accomplishments achieved within this overall PDP. It is hoped that the documents and discussions referenced herein, as well as future data and analyses collected pursuant to the studies called for by the Council, will provide a sound foundation for future policy making in this important area.

b. GNSO Councilor Position Statements

Commercial and Business Users Constituency (BC)

Explanation of 1-Nov-2007 Council votes regarding WHOIS resolutions

The votes cast by BC representatives on GNSO Council were based on previous statements and on discussions that occurred at the ICANN meeting in Los Angeles beginning 27-Oct-2007.

The BC Statement of 4-Oct-2007 can be found at http://www.bizconst.org/Positions-Statements/Statement-10-2007_WHOIS.doc. That statement includes an explanation for BC votes against implementation of OPOC (Resolution 1):

The BC does not consider the *Final Outcomes Report of the WHOIS Working Group* an adequate basis for implementation of the OPOC proposal.

The BC has devoted considerable resources and time to understand the extent of privacy concerns raised with regard to the WHOIS service. While there has been extensive discussion and debate over positions and views, we still have insufficient fact-based information upon which to evaluate proposed changes to WHOIS. With respect to whatever information and analysis has been compiled thus far, the BC does not see sufficient justification for abandoning or changing the current WHOIS service. We still lack data on the characteristics of registrants, how WHOIS data is being used, and how misuses of WHOIS may be affecting registrants.

The BC supported resolution 2 (as amended) for reasons cited in the BC Statement regarding the need for further study of WHOIS. In addition, WHOIS was discussed at length during Council working sessions on Saturday 27-Oct-2007. Those discussions revealed further reasons to maintain the current WHOIS system while conducting further study:

In its study of spam and WHOIS, the Security & Stability Advisory Committee (SSAC) concluded that registrants can significantly reduce the risk of receiving spam if they select a registrar who offers proxy service and employs technical protection measures to prevent harvesting of email addresses. SSAC did not examine the extent to which these protective measures are actually selected by registrants, suggesting the need for further study.

Registrants can already shield their identity from the public by selecting a Registrar who offers proxy registration services. It is not known how many registrars offer and advertise proxy registration services. Nor is it known how many registrants are currently selecting the service when they acquire or renew their domain names. This suggests the need to examine the extent and characteristics of registrants who avail themselves of proxy services.

We also have questions about compliance of proxy services as practiced today. Under the Registrar Accreditation Agreement, proxy services are required to reveal the registrants identity to a party providing reasonable evidence of actionable harm. Before making any changes to WHOIS, we

seek a compliance review of proxy vendors in responding to requests to relay communications and reveal information about registrants.

ICANN staff should proceed with the fourth study recommended by the *Working Group Final Outcomes Report*. Information on gTLD registrants and registrations and the use and misuse of WHOIS data.

Regarding our opposition to resolution 3, the BC is firm in its position that WHOIS requirements must be maintained as an obligation under the Registrar Accreditation Agreement. Moreover, the BC would not want resolution 3 to set a precedent whereby ICANN sunsets other existing contractual obligations if they are not explicitly supported by consensus policies.

Mike Rodenbaugh

Bilal Beirm

STATEMENT ON THE VOTE ON WHOIS AT THE COUNCIL MEETING IN LA FOR UTE DECKER, KRISTINA ROSETTE AND CYRIL CHUA

Statement of Intellectual Property Constituency representatives (for Board Report re WHOIS votes 31 October 2007)

Section 12 of the GNSO Policy Development Process (Annex A to ICANN By-Laws) provides, "A Supermajority Vote of the Council members will be deemed to reflect the view of the Council, and may be conveyed to the Board as the Council's recommendation." Since the vote to defeat Motion #1 regarding WHOIS, and to approve Motion #2, both qualify as Supermajority Votes under the PDP ("a vote of more than sixty-six (66) percent of the members present"), it does not appear that any further material is needed for the Board Report on these Motions. Furthermore, the recommendation appearing in Motion #3 was never the subject of a Policy Development Process, and thus a Board Report does not appear to be required. However, because there was no Supermajority Vote position on Motion #3, the IPC representatives to the Council provide the following information on the issues identified in Section 11 of the PDP. We have provided this information with regard to all three motions, in case the staff takes the view that it is appropriate to make a Board Report on Motion #3, and to include within it the outcomes on issues decided by Supermajority Votes, but without conceding that either view is correct.

Motion #1: IPC opposed this motion. The reasons for this opposition, as well as our views on the impact of the proposal on our constituency (item 11(b) of the PDP), are set out in the Constituency Statement submitted on October 4, 2007 (see pages 26-28 of the Staff Overview document, <http://www.gns0.icann.org/drafts/icann-staff-overview-of-WHOIS11oct07.pdf>):

"In its January 2007 statement, the IPC identified several critical questions about the OPOC proposal, in particular the roles and responsibilities of the new Operational Point of Contact. It also stated at that time: "Since the two proposals before the Task Force [OPOC and Special Circumstances] each call for the elimination of public access to some data that is now publicly available through the WHOIS service, the question of how to provide an alternative mechanism through which those with a specific legitimate need can obtain this data is crucial. As the representative of a group of stakeholders who clearly have such a legitimate need, the IPC believes that neither of these proposals (nor indeed any proposal that shares the characteristic of removing any WHOIS data from public access) should be adopted unless or until an efficient, reliable and speedy alternative mechanism for such access is ready to be implemented."

"The Working Group formed by the GNSO Council after the Lisbon ICANN meeting was charged with addressing questions which paralleled some of the

concerns raised by the IPC. IPC representatives participated actively in the Working Group. In our view, some progress was made in defining the roles and responsibilities of the OPOC. Much less progress was made on the crucial question of developing the alternative access mechanism that is needed. In neither area was general agreement achieved on answers to the questions posed by the GNSO Council.

“If Motion #1 were adopted, IPC members would be adversely affected. Interposing an “operational point of contact” between the WHOIS requester and the registrant will generally make the process of contacting the registrant slower, more difficult, more opaque and less reliable than it is today. The benefits for all parties of quick contact and prompt resolution of a wide range of disputes (including but not limited to those involving questions of infringement of intellectual property rights) will be largely forfeited; more cases will have to be resolved through more formal channels such as UDRP or litigation; and expense and delay will increase for all concerned. A particular concern is that no alternative mechanism exists (or is even proposed) for obtaining more complete contact information on registrants in case of a legitimate need which may be extremely pressing.”

Motion #2: IPC representatives supported this motion. The reasons for this support, and the anticipated impact on the constituency, were spelled out in the October 4 constituency statement referenced above. Although a number of wording changes were made to Motion #2 before it was voted upon, mainly as the result of amendments proposed by Ross Rader, Chuck Gomes and Robin Gross, and accepted by Kristina Rosette as the author of Motion #2, we do not believe that its basic thrust was changed, and thus the following statements in the Constituency Statement remain relevant:

“If Motion #2 were adopted, the impact on IPC members would probably be positive. In the long run, development of a stronger factual basis for any policy changes regarding WHOIS is likely to result in better decision-making. At a minimum, the practical impacts of different policy alternatives would be better understood.

“IPC supports Motion #2. We agree that there is not ‘an adequate basis for any implementation of the OPOC proposal,’ and that future policymaking in this area would benefit greatly from ‘a comprehensive, objective study ... of key factual issues regarding the WHOIS system, which has never been undertaken.’ The completion of such a study would provide a solid basis for the next steps in WHOIS policy development.”

Motion #3: IPC representatives opposed this motion, primarily for the reasons stated, and because of the impact anticipated, in the October 4 constituency statement:

“If Motion #3 were adopted, the impact on IPC members would be decidedly negative. Their ability to contact registrants (for the many legitimate reasons spelled out in many previous submissions) would become completely

unpredictable, and could vary wildly depending on the registry or registrar involved. It can be envisioned that registries or registrars would exercise their unrestricted control over registrant contact information by demanding extortionate prices for this data and imposing other onerous terms and conditions. There is also a risk that expensive and protracted litigation would ensue among registrants, registrars, registries, and requesters (including IPC members) over the various inconsistent policies that would be put into place. The likelihood of direct intervention by one or more governments into the process would increase significantly, in the absence of consistent self-regulatory practices. In their role as domain name registrants, IPC members would also face greater uncertainty about how their personal data would be handled by registrars or registries.

IPC opposes Motion #3. We disagree with the statement that the current WHOIS policies “cannot be reasonably implemented or enforced,” and note that ICANN has repeatedly committed to do just that. We oppose the “sunsetting” of the WHOIS contractual provisions that have been in place, with minimal modifications, throughout nearly all of ICANN’s history. We believe that the current system can and should be improved, including through policy changes that are based on a strong factual record about the uses and abuses of WHOIS data. To simply discard the current system, and let each ICANN registrar or registry follow its own wishes about access to, trafficking in, or accuracy of registrant contact data, would risk serious damage to the stability and security of the domain name system, and would not be in the best interests of any current participant in that system, including but not limited to the constituency IPC represents.”

ISPCP

Internet Service Provider and Connectivity Provider Constituency

The ISPCP Constituency is pleased to submit the following explanation of the votes cast by its representatives to Council - Tony Holmes, Greg Ruth and Tony Harris – during the GNSO Council face-to-face meeting in Los Angeles, on October 31st, 2007.

Ref: Motion #1

The ISP Constituency has never been supportive of the OPOC solution as promoted within Council by the Registrar Constituency and others. The ISPCP has always stressed the need for balanced policy that takes into consideration the interests of all stakeholders, and allows for the effective enforcement of civil and criminal laws, while protecting registrant information from marketing or other illegitimate/illegal uses.

Indeed, the fact that the recent WHOIS Working Group was constrained to focus on the OPOC, as the only model to be developed for implementation was, in our opinion, a misguided decision since it effectively barred consideration of alternative ways to move forward. Other alternatives such as Tiered Access based on clearly defined and legitimate needs, still demands more attention.

In addition discussions within the WHOIS Working Group have failed to come up with precise and consensus solutions to some elementary concerns:

- How can quick and efficient response to anti-cybercrime data gathering be ensured from an OPOC?
- What parties have access to the hidden data?
- Who decides which parties have access to the hidden data?
- Who pays for the costs involved in providing access to hidden data?

These failures naturally rendered it impossible for the ISPCP representatives to support Motion #1, since clearly any move to implementation of the OPOC would be ill-advised under these circumstances.

Ref: Motion # 2

The ISPCP representatives voted in favour of motion #2, because it adequately reflects the lack of consensus emerging from the various WHOIS task forces and working groups that have addressed this issue, and calls for more research and data gathering procedures, prior to embarking on any course of implementation, and thus also takes into account legitimate concerns expressed by the GAC. Additional factual data can only assist the GNSO in their deliberations and decision making process.

Ref: Motion # 3

The ISPCP constituency has struggled to understand the rationale encompassing this motion, which by virtue of being conditioned on the outcome of a vote on motion # 1, sounded uncomfortably like an 'or else' threat. This is not considered helpful in resolving what has been a protracted and difficult matter. Whilst accepting the current situation needs to be subject to review and improvement, sunseting existing contractual provisions can only be seen as a backward step, leaving a total void in the process, which in itself appears irresponsible and unacceptable to many parties.

Our representatives were unable to find any justification for taking the line of action prescribed in motion #3, which if implemented would naturally be detrimental to the network activities of the ISPCP membership, and thus voted against this motion.

STATEMENT OF THE NON-COMMERCIAL USERS CONSTITUENCY (NCUC)

On Motion #1

The Non-Commercial Users Constituency (NCUC) supported OPOC at the time it originally passed by the GNSO WHOIS Task Force in the Spring 2006. But even at that time, OPOC was a compromise of NCUC's policy objectives and did not fully protect the legitimate privacy rights of Internet users. Since the time the GNSO Council approved OPOC, the proposal took a radical direction, including attempts to create a mechanism to force the disclosure of personal information in cases where the law would not permit disclosure. Fortunately, there was no consensus within the GNSO to accept that over-reaching approach.

Without a consensus within the GNSO on how much access to private information the OPOC regime would provide, Motion #1 punted these difficult, yet extremely important policy decisions to the ICANN staff to decide. NCUC did not believe it was appropriate to send policy questions to ICANN staff to sort out.

NCUC hoped to reach agreement within the GNSO to amend Motion #1 such that appropriate oversight and policy guidance could be given to the ICANN staff with respect to the implementation of OPOC. Without such guidance and oversight, NCUC believed that the recent macerations to OPOC had poisoned the proposal to the extent that it may be even worse than the status quo for privacy in some cases. Without agreement from GNSO constituencies to amend Motion 1, NCUC could not vote in favor of Motion #1 as drafted.

On Motion #2

NCUC supported Motion #2 to conduct studies on WHOIS because we believe there are important facts to be explored regarding the need for privacy protection of WHOIS data. Useful studies could also be done regarding the effects on crime prevention in country-code top-level domains that shield some contact data in order to protect the privacy rights of Internet users.

NCUC does not believe, however, that waiting for outcomes of studies on WHOIS should prevent efforts to reform the policy in order to bring it into compliance with national law and international agreements. ICANN has an obligation to answer to the international legal community and promptly work towards remedying the conflict between law and ICANN policy.

Besides the privacy concerns, current ICANN policy on the matter places Registrars and Registries at risk for potential legal liability for violations of European consumer protection laws or national privacy laws.

On Motion #3

NCUC strongly supported Motion #3 because it provided a mechanism to spur uncompromising parties to the negotiating table on WHOIS in good faith.

Without a mechanism to bring to the negotiating table parties who already have what they want, there is no incentive to voluntarily agree to any changes to the status quo with WHOIS. NCUC continues to believe that “sun-setting” the non-consensus policy of WHOIS is the best course of action for the ICANN Board and the GNSO.

There is no legitimate rationale for retaining policies that lack the broad support of the ICANN community, such as WHOIS. WHOIS never held a consensus position within the GNSO and it is a tragic mistake to continue with such a non-consensus policy, particularly when ICANN has been warned by national and regional data protection commissioners that WHOIS violates a number of national laws and international agreements.

Reform of WHOIS is badly and immediately needed to protect the privacy rights of Internet users, bring ICANN into compliance with international law, and remove the legal risk on Registrars and Registries for violations of law imposed by ICANN contracts.

NCUC incorporates into this statement, its endorsement of the 30 October 2007 [letter](#)¹ written by NCUC member and online privacy expert EPIC and other concerned individuals and organizations to the ICANN Board on the need for WHOIS reform.

Signed,

NCUC GNSO Policy Councilors:
Robin Gross, Norbert Klein, & Mawaki Chango
4 November 2007

¹ <http://ipjustice.org/wp/2007/10/30/epic-ngo-letter-to-icann-board-on-need-for-WHOIS-reform/>

STATEMENT OF NOMINATING COMMITTEE APPOINTEE AVRI DORIA

I voted for motions 1 and 3 and against 2.

A lot of give and take had gone into the OPOC proposal and I felt that it deserved a chance for implementation. And though there were a few large issues that needed to be worked out, for example the reveal function and the authorisation model for levels of access, I felt that a solution was still possible with more work.

My vote for motion 1 also reflects my belief that the process of implementation, including a genuine iterative process between the staff and council, allows individual issues to be explored at a more practical level and within an implementation context. Sometimes issues that seem intractable as abstract principles become solvable at the practical level. As I have mentioned on several occasions in the council, I do not believe there is a strict line that separates the policy issues from the implementation issues and believe that often the implementation makes implicit policy. This is one of the bases for my belief that working on detailed questions that emerged from an implementation effort would have assisted the council in coming to further consensus on its policy differences.

I have mixed feelings regarding Motion 2. I certainly support the goal of ending this PDP, especially if we are not trying to complete work on OPOC. As for further studies, I can see a role for professionally done studies and surveys, which are scientifically well formed, methodologically sound and statistically valid. Part of the basis for these sorts of studies requires a good understanding of the requirements, which involves knowing what questions the study is intended to answer. One concern is that without the strictest rigor in defining studies, they often end up as one sided and merely serve to confirm the opinions of the surveyor or of the surveyor's client. I think we all have the experience of seeing competing studies on each side of an issue.

I am apprehensive about our ability to deliver on high quality rigorous preparations in the schedule demanded by the motion, especially with our current work load and when we are about to go through the holiday season followed by the initial work on restructuring. One of the reasons given, off line, by some for the rush in initiating the studies was to support the calls being made by the GAC. While I have no difficulty in supporting the GAC on this issue, I do not feel that we need to rush and do not believe they are asking us to rush. Rather, I feel we need to let the dust settle before reengaging in this particular tussle. Now that we have approved this motion, however, I am committed to completing its requirements as well as possible in the time allotted.

On motion 3, I believe that WHOIS is unsuited to the service to which ICANN is putting it and it is no longer needed for its original purpose as was discussed in a paper included in the appendices of the Task Force report.

Given that there is no consensus on the service it is being required to provide and that it is not fit for this purpose, I believe it should be retired from service.

I also strongly believe that WHOIS causes more harm to the general public than it prevents. And while I understand that investigative agencies, both public and private, find it a useful public database in their hunt for a few miscreants, I do not believe that this warrants harm against the majority of registrants who would never intentionally misuse their domain name. I think the harm this tool causes to global civil liberties is far too serious for ICANN to continue to require its use.

Registrar Constituency representatives record and explanation of votes on WHOIS:

Motion #1 to move the Consensus Policy Recommendations of the TF to a staff led implementation phase.

In April 2005, a group of registrars came together during the Mar del Plata ICANN meeting to discuss the intractable issue of WHOIS. The goal of this meeting was to explore our mutual interests and to seek a possible compromise position that we could champion inside the GNSO in an effort to close off years of debate on the issue.

Through our discussions we came to believe that it was in the interests of registrars to explore a solution that would help us avoid the complexity and costs associated with the then-current tiered access proposals while at the same time permitting us to conduct our operations in a manner that complied with both our ICANN contracts and the various legislative jurisdictions we each operate in.

With this understanding, we developed a proposal that sought a compromise between the tiered access proposals of the gTLD registry community, the unfettered access proposals of the intellectual property community and the calls for enhanced privacy that were coming from the non-commercial user community. This proposal very simply called for the creation of a new point of contact to replace the aged technical and administrative contacts and to allow registrants to opt-out of publication of their personal contact information from the WHOIS system.

This proposal eventually became the consensus policy recommendation of the WHOIS Task Force and was presented to the GNSO Council. In an attempt, initiated by the Registrar Constituency, to expand the consensus support for the OPOC policy recommendation to include the law enforcement community, the Council voted to refer the report to an ad hoc working group for the purpose of exploring where further areas of agreement might be found.

It is worth noting that the intellectual property community did not support the consensus recommendation of the Task Force nor the attempt to forge further consensus through the formation of this working group.

Despite all attempts to facilitate a reasonable consensus outcome, this working group is widely regarded as having failed to achieve its goals. If anything, the concerted efforts of the intellectual property community, with the complicity of the working group chair, turned back the clock on the issue causing old factions to re-surface and damaging the prior consensus of the community.

These setbacks notwithstanding, the Registrar constituency remained firmly committed to finding the compromise ground that would allow the community move forward with closing this issue with the support of the consensus of the community. Thus, while we did not agree with many of the recommended changes put forward during the final working group, we voted in favor of the original proposal, as modified by the working group lead by the intellectual property and business community to ensure that this issue would finally close with positive, forward movement.

We also believe it is important to note that again, the intellectual property community did not support the compromises they arranged for inclusion in the output of the working group.

Motion #1 to move the OPOC policy recommendation to a staff implementation phase:

Tom Keller (EU) - In favor.
Adrian Kinderis (AP)- In favor.
Ross Rader (NA) - In favor.

While we remain hopeful that the community may eventual come to a shared view concerning the best path forward for this issue, we ultimately recognize that this is not a registrar issue. We have recently heard that ICANN will be moving forward with a process to allow specific registrars in specific jurisdictions to file for exemptions from specific clauses of their agreement with ICANN should those requirements be in conflict with their national law. We believe that this process of exceptions will address the requirements of the registrar industry and its customers.

Motion #2 to defer deciding on the recommendations of the task force and undertake further study of the issue.

As was pointed out by a public commenter during the Council meeting of October 31, 2007 - this motion was silly in that it proposed to undertake study of an issue, at no small cost, that the GNSO has been studying consistently since 2000. Further, when pressed for details of what they would like to study, proponents of this motion could not, or would not, be more specific with their requests. This motion was essentially a request by the intellectual property community to undertake broad, open-ended studies under unknown timelines while at the same time deferring on deciding on how to move forward with the consensus recommendations of the Task Force.

Recognizing the support for this motion, we undertook to understand the importance of the studies and attempted to find some common ground that

might help move the issue forward in a manner that could be supported by a larger number of players. In discussing the importance of the study with members of the Intellectual Property constituency, we learned that they were purely a tactical suggested intended to draw out the current process and permit the status quo to continue as long as possible.

We then entered into serious discussions with representatives of the intellectual property in order to find how we could best move the issue forward without engaging in open-ended, drawn-out and costly studies. The compromise agreement that we arrived at very simply called for the GNSO to conduct the studies using simple method that required that the studies occur in the context of future policy development activity. For instance, were the Council to initiate a policy development process on whether or not natural persons could be exempted from WHOIS publication, then a study might be conducted to answer questions specific to that PDP. This broadly followed a more scientific method that simply requires the development a hypothesis prior to undertaking any test or study.

With this agreement in place, we prepared an amendment to the original motion proposed by the intellectual property constituency, which they accepted as friendly. This amendment then went through a series of additional amendments that largely eliminated the narrow scope of study and all requirements to tie any studies to a specific PDP. It is worth noting that despite the agreement arrived at between the Registrar Constituency and the Intellectual Property Constituency, that these amendments were also accepted by the Intellectual Property Constituency as friendly amendments.

Despite the days of negotiation that went into crafting the final form of the amendments and the compromises sought, we could not support the motion for broad, open-ended and costly study with the knowledge that the proposal was only being made to protract the deadlock and safeguard the status quo.

We therefore voted against this motion.

Motion #2 to defer deciding on the recommendations of the task force and undertake further study of the issue.

Tom Keller (EU) - Against.
Adrian Kinderis (AP)- Against.
Ross Rader (NA) - Against.

Motion #3 to sunset the WHOIS related requirements of the operations contracts if the community is unable to come to broadly supported consensus recommendations within the next 12 months.

The purpose of this motion was to change the incentives of the parties to this negotiation by changing the status quo at some future date if they are not able to come to a reasonable agreement on the issues at hand.

The Registrar community clearly does not support the elimination of WHOIS, despite the rhetoric to the contrary. However, and the record is clear on this, we have a strong commitment to implementing a broadly supported compromise that we can all live with. This doesn't mean simply living with the status quo because we have a strong enough lobby to prevent key recommendations from moving forward - it means going through the painful process of find where the common ground lies and getting everyone to give up just enough to agree on that common ground.

We therefore voted in favor of this motion on the basis that it would have the effect of forcing all of the actors involved in this discussion to come together and work in good faith towards finding that painful common-ground, lest they all lose everything.

Motion #3 to sunset the WHOIS related requirements of the operations contracts if the community is unable to come to broadly supported consensus recommendations within the next 12 months.

Tom Keller (EU) - In favor.
Adrian Kinderis (AP)- In favor.
Ross Rader (NA) - In favor.

It is worthwhile noting that this motion was barely defeated and unlike the other motions voted on during this session, saw support almost equal to its opposition.

STATEMENT OF THE REGISTRY CONSTITUENCY

The votes made by the three RyC GNSO Council representatives were based on the Constituency Statement submitted on 4 October 2007 which can be found at <http://www.gtldregistries.org/news/2007/2007-10-04-01.pdf>. In particular, note the excerpts from that statement below.

“RyC offers the following comments on the three issues specified in the resolution creating the WHOIS Working Group:

1. “... the roles, responsibilities and requirements of the OPOC, and what happens if they are not fulfilled;”
2. “...to examine how legitimate interests will access unpublished registration data;”

The OPOC proposal in its present form does not deal with the question of access to unpublished WHOIS data nor did the WHOIS Working Group reach adequate agreement in this regard. This question must be answered in sufficient detail to provide policy direction regarding what, when, how and to whom unpublished WHOIS data must be released by the OPOC. Until that is done, the OPOC proposal provides a solution for accommodating privacy concerns, but does nothing to deal with the legitimate needs of access for unpublished WHOIS data. The RyC believes that the question of access can be dealt with separately and most appropriately by a tiered access mechanism to be developed. The RyC proposes that the GNSO Council, or the ICANN Board, take appropriate steps to encourage the parties at interest to negotiate and develop such a mechanism.

3. “... whether publication of registration contact information should be based on the type of registered name holder (legal vs. natural persons) or the registrant’s use of a domain name.”

The RyC believes that the appropriate distinction should be based on whether the name holder is a natural person with an inherent right to privacy of personal data. The RyC does not believe that there is a practical test for determining what types of use might qualify for privacy protection.”

“The Working Group was neither able to reach consensus on these issues, nor to make recommendations concerning how current policies may be improved. There are several motions pending before the GNSO Council, all recognizing the lack of consensus and varying widely in proposals for a way forward.”

Edmon Chung
Chuck Gomes
Cary Karp

c. Summary of Public Comments: 13 September–30 October on Recent GNSO WHOIS Activities

The public comment period on Recent GNSO WHOIS Activities ran from 13 September through 30 October, 2007. 245 comments were received. Of these, 238 were on-topic and not duplicates. Public comments were particularly invited on:

- The WHOIS Task Force Report of 12 March, 2007
- The WHOIS Working Group Report of 20 August, 2007
- The Final Staff Overview of Recent WHOIS Activities of 11 October (and the earlier Draft Staff Overview of 13 September). In particular, comments were sought on the three proposed motions offered to-date and referenced on pages 9 and 10 of the October Staff Overview report (see summary below).
- The 11 October Staff Implementation Notes on the 20 August WHOIS Working Group Report.

The public comments are archived at:

http://www.icann.org/public_comment/#WHOIS-comments-2007

1. High-level summary of public comments received:

238 comments were received, representing interested views from individuals, consumer groups, and a broad cross section of corporations, industry trade associations and law firms. Comments were received from more than 16 countries including Argentina, Brazil, Canada, Columbia, Denmark, Finland, France, Germany, Hong Kong, Italy, the Netherlands, New Zealand, Switzerland, the United Kingdom and the United States.

The vast majority of comments (approx. 223) support Motion #2 and oppose adoption of an Operational Point of Contact at this time. These comments are described further in section 2 below. 13 comments support Motion #1 (and Motion #3 in the absence of Council support for Motion #1). These comments

are described further in section 3 below. Two comments voiced alternative views about the process by which the WHOIS Working Group developed its report, but did not comment on the substance of the proposals. These are not addressed further in this summary. A listing of all individuals who submitted comments, along with affiliations if provided, is attached for easy reference.

2. Summary of public comments in support of Motion #2:

Comments supporting Motion #2 were made by a broad cross section of corporations, industry trade associations and law firms from around the world. Comments from companies included many large businesses in a variety of industries including financial services, pharmaceuticals, manufacturing, automotive, retail, high technology and many others. Trade association comments included the software industry, entertainment industry, financial services industry and other commercial interests. Law firms representing a broad array of commercial, consumer and brand interests also submitted comments supporting motion #2 and rejecting the OPOC proposal.

Key points made in these comments include the following:

- Real-time, publicly accessible WHOIS data is an essential tool for protecting consumers from online fraud, facilitating essential commercial transactions such as mergers and acquisitions, licenses and secured transactions, and the management of large domain name portfolios.
- Changes to WHOIS must be based on empirical, not anecdotal, data obtained via an objective and comprehensive ICANN study on the legitimate uses and abuses of the WHOIS system, and the nature of registrants. The results of the study called for by Motion 2 are likely to suggest practical solutions around which consensus on the need for change can be based.
- The GNSO Council should not proceed with OPOC given the numerous outstanding issues that have not been resolved. The WHOIS Working Group did not reach consensus on a critical aspects of the OPOC policy

such as standards for the timely transmission of requests, mechanisms for enforcing OPOC compliance with its obligations, and the mechanisms for providing legitimate third parties with access to unpublished data.

- Two comments emphasized that in the event that OPOC is implemented, a specific and expeditious means of access would need to be provided for entities such as representatives of the financial services sector in order to deter identity theft or consumer fraud.
- Although many comments in support of Motion 2 came from large brand owners, comments also reflected representation from companies from all sectors of the economy (entertainment, consumer products, computer game development, financial services, manufacturing, consumer retail, broadcasters, and real estate franchisers to name a few), and related extensive descriptions of their enforcement efforts and the harm to their customers that they combat using WHOIS information.

3. Summary of public comments in support of motions #1 and #3

13 comments supported Motions #1 and #3. Several comments were submitted by individuals who are domain name registrants and individual users of the Internet. Comments were also received from groups representing the interests of individual users.

Key points made in these comments include the following:

- Individuals should not be required to sacrifice the privacy of their personal information in order to register a domain name. Individuals who are operating in a non-commercial context have the right to restrict or prevent the public display of their personal contact information.
- ICANN has mandated collection and display of WHOIS data as a legacy of old practices, not because there has been any agreement that it should be so.

- Data protection laws exist in many countries that apply to WHOIS data and to registries, registrars and domain name registrants around the globe. WHOIS policy must be changed to reflect these data protection laws and privacy rights.
- OPOC will enhance the accuracy of information provided in WHOIS because registrants will be more likely to provide accurate information if they have assurance that the information will not be accessible publicly. This will also reduce the likelihood that contact data would be harvested and used for illegitimate purposes such as spam, distributing malware and a variety of online criminal acts including consumer fraud.
- There is a shared concern about reducing illegal and other illegitimate activities online. Several comments noted that if OPOC is implemented, it will be important to provide an effective means of access to unpublished contact information when required for law enforcement purposes or when otherwise needed to investigate and deter unlawful online activities.
- One detailed comment supported OPOC and also considered several issues related to implementation of OPOC. First, the comment questioned the likelihood that implementation of OPOC would have substantial cost implications for service providers. This comment also raised significant objection over a proposal suggested in the WHOIS Working Group Report that the OPOC might reveal data to a requester of unpublished contact information. The comment supported auto-verification of OPOCs by email at the time of registration, putting the name on hold until verification was received. This same comment also supported the need for further study of WHOIS.
- If OPOC is not implemented, all non-consensus WHOIS provisions in registry and registrar agreements should sunset.
- One comment proposed an alternative to OPOC, referred to as the “natural persons proposal”. The proposal envisions that during the

registration process, every registrant would declare that they are: 1) either a natural person who will use the domain exclusively for non-commercial activity; or 2) another type of registrant. The contact information for natural persons would not be publicly accessible in WHOIS. A mechanism would be implemented that would allow a requester access to the unpublished data if the reason the information was removed was no longer valid, or if the domain was being used illegally or to harm the security and stability of other Internet resources. A third party would evaluate the request and allow release of data if the requester proved that one of these conditions had been met.

d. Link to Staff Overview of Recent GNSO WHOIS Activity (Final Report) and to the Staff Implementation Notes on the WHOIS Working Group Report:

<http://gns0.icann.org/drafts/icann-staff-overview-of-WHOIS11oct07.pdf>

<http://gns0.icann.org/drafts/gns0-WHOISwg-report-staff-implementation-notes-11oct07.pdf>.

e. Copy of Minutes

31 October 2007

Proposed [agenda and documents](#)

List of attendees:

Philip Sheppard - Commercial & Business Users C -absent - apologies
Mike Rodenbaugh - Commercial & Business Users C.
Bilal Beiram - Commercial & Business Users C
Greg Ruth - ISPC
Antonio Harris - ISPC
Tony Holmes - ISPC
Thomas Keller- Registrars - Remote participation
Ross Rader - Registrars
Adrian Kinderis - Registrars
Chuck Gomes - gTLD registries
Edmon Chung - gTLD registries
Cary Karp - gTLD registries
Kristina Rosette - Intellectual Property Interests C
Ute Decker - Intellectual Property Interests C
Cyril Chau - Intellectual Property Interests C
Robin Gross - NCUC
Norbert Klein - NCUC
Mawaki Chango - NCUC - remote participation
Sophia Bekele - Nominating Committee appointee - absent - apologies
Jon Bing - Nominating Committee appointee
Avri Doria - Nominating Committee appointee

19 Council Members
(25 Votes - quorum)

ICANN Staff

Denise Michel - Vice President, Policy Development
Dan Halloran - Deputy General Counsel
Olof Nordling - Manager, Policy Development Coordination
Kurt Pritz - Senior Vice President, Services
Craig Schwartz - Chief gTLD Registry Liaison
Patrick Jones - Registry Liaison Manager
Karla Valente - gTLD Registry Liaison
Liz Gasster - Senior Policy Counselor
Glen de Saint Géry - GNSO Secretariat

GNSO Council Liaisons

Suzanne Sene - GAC Liaison - absent - apologies
Alan Greenberg - ALAC Liaison

Rita Rodin - ICANN Board member - remote participation
Bruce Tonkin - ICANN Board member

[Audio Cast](#)
[Webcast](#)

[Transcription](#)

Avri Doria chaired the meeting.

Approval of the [agenda](#)

Item 1: Update any Statements of Interest

Mike Rodenbaugh noted that he had updated his [statement of interest](#)

Item 4: [WHOIS – report](#), open and council discussion, Vote on motions <http://gnso.icann.org/drafts/icann-staff-overview-of-WHOIS11oct07.pdf>

Avri Doria, summarising the WHOIS process, noted that the WHOIS Task Force in its Final Report <http://gnso.icann.org/issues/WHOIS-privacy/WHOIS-services-final-tf-report-12mar07.htm> recommended an Operational Point of Contact (OPOC). The GNSO Council decided to create a working group <http://gnso.icann.org/meetings/minutes-gnso-12apr07.shtml> that would discuss the implementation details, responsibilities and functions of the OPOC. The Outcomes report of the WHOIS working group <http://gnso.icann.org/drafts/icann-WHOIS-wg-report-final-1-9.pdf> suggested some responses to the issues within OPOC but did not satisfactorily answer constituency and community concerns.

The public comments http://www.icann.org/public_comment/ reflected the same concerns as those of the Task Force, the Working Group, and the Council.

Avri Doria noted that the three motions before the Council were circulated for comment in the Final Staff Report.
<http://gnso.icann.org/drafts/icann-staff-overview-of-WHOIS11oct07.pdf>

Motion #1 offered by **Avri Doria**, seconded by **Ross Rader**

Whereas the WHOIS Task Force has delivered its report and
Whereas the Outcomes report of WHOIS Working Group on OPOC implementation issues has also been released and
Whereas the ICANN staff has produced notes on a proposed implementation and
Whereas the GNSO constituencies and the larger community have reviewed and commented on both reports and the proposed implementation notes

Resolved:

The GNSO council supports the OPOC recommendation as contained in the Task Force report and requests that the staff consult the report of the Working Group and all follow-on discussions, including comments supplied by the constituencies during the review and by the community during the open review, in creating a proposed implementation of OPOC.

The council further requests that the staff consult with the GNSO and the community at large once it has developed this proposed implementation plan.

Motion #2 offered by **Kristina Rosette**, seconded by **Mike Rodenbaugh**
WHEREAS:

1. The GNSO Council hereby accepts the Working Group report and acknowledges the tremendous effort by Working Group participants and ICANN staff.
2. The GNSO Council does not consider the Working Group report as an adequate basis for any implementation of the Operational Point of Contact (OPOC) proposal, due to the inability to reach agreement on a number of key issues identified in the charter of the Working Group.
3. The GNSO Council notes that no comprehensive, objective study has yet been made of key factual issues regarding the WHOIS system, and that future ICANN policymaking could greatly benefit from the results of such a study.

THEREFORE BE IT RESOLVED:

1. The GNSO Council thanks all of the volunteers, consultants, staff and others who have participated in the GNSO's examination of WHOIS policy over the last four years.
2. Building on the work done in response to paragraph (c) of the GNSO

GNSO Council Report to the ICANN Board --
Recent GNSO Policy Activities on WHOIS

Doc. No.:

Date:
12 November 2007

Council Resolution #3 of September 6, 2007, the Council requests that ICANN staff take the necessary steps to proceed with a comprehensive, objective study on the issues identified by the WHOIS Working Group, by the Governmental Advisory Committee in its statement of principles on WHOIS, and by the Council. These issues include the characteristics of gTLD registrants, the uses and abuses of WHOIS data, and a review and analysis of the different proxy services available today. Specifically, the Council directs the staff to present for its review a draft Request for Proposals for such a study, including a proposed budget and timeline, and a methodology for outreach to knowledgeable parties, within 90 days from the date of adoption of this resolution.

3. The GNSO Council will take the results of this study, once completed, into account in deciding on the next steps in WHOIS policy development.

Motion #3 conditional motion offered by **Ross Rader**, seconded by **Mawaki Chango** (may be withdrawn if Doria motion above is approved)

Whereas;

- (i) The GNSO Council has considered the reports of the WHOIS Working Group and WHOIS Task Force, and;
- (ii) That the GNSO Council vote on resolution [XXXXX] failed to produce supermajority or majority support for the recommendations of the report of the Task Force, and;
- (iii) The GNSO Council considers that the results of this vote signifies the continued lack of consensus on the key issues and possible solutions to those issues, both within the Council, the GNSO and between key stakeholder groups, and;
- (iv) The GNSO Council recognizes that there is no standing consensus policy concerning the management of the WHOIS service and data provided to the public through that service by ICANN's contracted commercial operators, the registries and registrars, save and except the WHOIS Data Reminder Policy and the WHOIS Marketing Restriction Policy, and;
- (v) That significant policy must have the support of the Internet and DNS community and without that support, those policies cannot be reasonably implemented or enforced.

Therefore be it resolved;

- (i) That, with regret, the GNSO Council advises the ICANN staff and Board of Directors of the lack of general consensus on the key issues and solutions pertaining to gTLD WHOIS, and;
- (ii) That due to this lack of consensus the GNSO Council recommends that the Board consider "sunsetting" the existing current contractual requirements concerning WHOIS for registries, registrars and registrants that are not supported by consensus policy by removing these unsupported provisions

from the current operating agreements between ICANN and its contracted parties, and;
(iii) That these provisions be sunset no later than the end of the 2008 ICANN Annual General Meeting and;
(iv) That such provisions will remain sunset until such time that consensus policy in this area has been developed to replace the sunset provisions, at which point they will be eliminated or modified.

Ross Rader proposed that the motions be entered as read.

Avri Doria explained that Council would first add amendments to the proposed motions, and then invite discussion.

Avri Doria proposed that a roll call vote be taken on the motions 1, 2 and 3 in sequence.

Motion 1 Action

Avri Doria, seconded by **Ross Rader** proposed:

Whereas the WHOIS Task Force has delivered its report and
Whereas the Outcomes report of WHOIS Working Group on OPOC implementation issues has also been released and
Whereas the ICANN staff has produced notes on a proposed implementation and
Whereas the GNSO constituencies and the larger community have reviewed and commented on both reports and the proposed implementation notes

Resolved:

The GNSO council supports the OPOC recommendation as contained in the Task Force report and requests that the staff consult the report of the Working Group and all follow-on discussions, including comments supplied by the constituencies during the review and by the community during the open review, in creating a proposed implementation of OPOC.

The council further requests that the staff consult with the GNSO and the community at large once it has developed this proposed implementation plan.

The motion did not pass.

17 votes against: Mike Rodenbaugh, Bilal Beiram, Ute Decker, Kristina Rosette, Cyril Chua, Tony Harris, Tony Holmes, Greg Ruth, Jon Bing, Robin Gross, Norbert Klein, (one vote each)
Edmon Chung, Chuck Gomes, Cary Karp (2 votes each)

7 votes in favour: Adrian Kinderis, Ross Rader, Tom Keller, (2 votes each)
Avri Doria (one vote)

1 abstention: Mawaki Chango

Philip Sheppard and **Sophia Bekele** were absent, and did not vote.

Motion 2 Action

Note: Detailed discussion of Motion 2 can be found in Appendix A below.

Proposed by **Kristina Rosette**, seconded by **Mike Rodenbaugh** with friendly amendments from **Ross Rader**, **Robin Gross**, **Chuck Gomes** that were accepted

WHEREAS;

1. The GNSO Council has recently received the WHOIS Working Group final report

<http://gnso.icann.org/drafts/icann-WHOIS-wg-report-final-1-9.pdf>

and;

2. The GNSO Council acknowledges that the broad range of stakeholders with interests in this issue has lead to a wide range of views of what the policy issues are and how to best address those policy issues with solutions that can be supported by the consensus of the community,

and;

3. The GNSO Council observes that the Working Group failed to reach agreement on several of the key issues identified in the charter of the Working Group,

<http://gnso.icann.org/issues/WHOIS-privacy/WHOIS-wg/WHOIS-working-group-charter-16apr07.pdf>

and;

4. That broadly, the scope of the issues in this area have evolved substantially over the term of this Policy Development Process since it was originally chartered, and;

5. A comprehensive, objective and quantifiable understanding of key factual issues regarding the gTLD WHOIS system will benefit future GNSO policy development efforts, and;

6. The rights and requirements of natural persons, the legal and business communities, anti-crime and law enforcement and registrars in the areas of

privacy, access, enforcement, investigation, consumer protection and research would benefit from future policy development by the GNSO.

THEREFORE, Be it resolved that the GNSO Council;

1. Sincerely thanks all of the volunteers, advisors, consultants, staff, stakeholders, observers and constituency participants who have contributed to the GNSO's examination of WHOIS policy over the last four years, and;
2. Formally ends the Policy Development Process on gTLD WHOIS without making any recommendations for specific policy changes to ICANN's Board of Directors, and;
3. Recognizes the demand for future policy development including, but not limited to, ensuring appropriate privacy safeguards for natural persons, lawful access to data for rights enforcement, consumer protection, law enforcement and anti-crime purposes and will immediately initiate the following sequential actions: 1) Council shall provide additional definition regarding the potential data gathering and study requirements 2) staff shall provide the Council with rough cost estimates for various components of data gathering and studies no later than February 15th, 2008; 3) the Council will decide what data gathering and studies would be pursued; and 4) staff will perform the resulting data gathering and studies and report the results back to the Council .
4. May initiate policy development activities in this area, as supported by the findings of the data-gathering and study activities upon their completion.

The motion passed.

17 Votes in favour: Mike Rodenbaugh, Bilal Beiram, Ute Decker, Kristina Rosette, Cyril Chua, Tony Holmes, Tony Harris, Greg Ruth, Robin Gross , Norbert Klein, Jon Bing (one vote each) Chuck Gomes, Cary Karp, Edmon Chung (2 votes each)

7 Votes against: Adrian Kinderis, Tom Keller, Ross Rader, (2 votes each) Avri Doria, (one vote)

1 abstention: Mawaki Chango (one vote)

Philip Sheppard and Sophia Bekele - Absent (one vote each)

Motion 3 Action

Conditional motion offered by **Ross Rader**, seconded by **Mawaki Chango**

Whereas;(i) The GNSO Council has considered the reports of the WHOIS Working Group and WHOIS Task Force, and;
(ii) That the GNSO Council vote on Resolution One failed to produce supermajority or majority support for the recommendations of the report of the Task Force, and;
(iii) The GNSO Council considers that the results of this vote signifies the continued lack of consensus on the key issues and possible solutions to those issues, both within the Council, the GNSO and between key stakeholder groups, and;
(iv) The GNSO Council recognizes that there is no standing consensus policy concerning the management of the WHOIS service and data provided to the public through that service by ICANN's contracted commercial operators, the registries and registrars, save and except the WHOIS Data Reminder Policy and the WHOIS Marketing Restriction Policy, and;
(v) That significant policy must have the support of the Internet and DNS community and without that support, those policies cannot be reasonably implemented or enforced. Therefore be it resolved;

(i) That, with regret, the GNSO Council advises the ICANN staff and Board of Directors of the lack of general consensus on the key issues and solutions pertaining to gTLD WHOIS, and;
(ii) That due to this lack of consensus the GNSO Council recommends that the Board consider "sunsetting" the existing current contractual requirements concerning WHOIS for registries, registrars and registrants that are not supported by consensus policy by removing these unsupported provisions from the current operating agreements between ICANN and its contracted parties, and;
(iii) That these provisions be sunset no later than the end of the 2008 ICANN Annual General Meeting and;
(iv) That such provisions will remain sunset until such time that consensus policy in this area has been developed to replace the sunset provisions, at which point they will be eliminated or modified.

The motion did not pass.

13 votes against:

Mike Rodenbaugh, Bilal Beiram, Ute Decker, Kristina Rosette, Cyril Chua, Tony Harris, Tony Holmes, Greg Ruth, Jon Bing, (one vote each)
Edmon Chung, Chuck Gomes, (2 votes each)

10 in favour:

Robin Gross, Norbert Klein, Mawaki Chango, Avri Doria, (one vote each)
Adrian Kinderis, Tom Keller, Ross Rader (two votes each)

Cary Karp (two votes) had left at the time of voting.

Total 23 votes
Philip Sheppard and Sophia Bekele absent, did not vote.

The meeting ended at 12:30 local time.

Next GNSO Council teleconference will be on Tuesday 20 November 2007 at 21:00 UTC.

see: [Calendar](#)

Appendix A – Detailed Discussion of Motion 2:

Avri Doria opened the Council discussion on **motion 2** stating that **Ross Rader** had sent an amendment to motion 2 to the Council list, **Kristina Rosette** in accepting it as a friendly amendment, proposed further amendments to **Ross's** amendment to read in clause 6 after "anti-crime" "legal and business communities".
<http://gns0.icann.org/mailling-lists/archives/council/msg04066.html>

Ross Rader explained that the purpose of his amendments to motion 2, as presented by **Kristina Rosette**, was two-fold;

"a) to conclude the policy development work of the GNSO on the issue of WHOIS until such time that we have identified specific issues that we can break down into discrete policy development activities. I do not believe that we attempt again a broad reform of WHOIS but rather, focus on smaller, narrower sets of issues in the field that we can deal with in short periods of time while still achieving meaningful results, and;

b) to focus the study work required to line up against specific policy areas where we need further information in order to understand the scope of issues or work required. A broad study of WHOIS will probably be as effective and useful as a broad PDP on WHOIS. However, narrower more focused study - or several of them even - will likely bring us much closer to understanding the issues we need to properly consider our policy work."

Ross Rader read the amended motion into the minutes.

WHEREAS;

1. The GNSO Council has recently received the WHOIS Working Group final report and;

2. The GNSO Council acknowledges that the broad range of stakeholders with interests in this issue has lead to a wide range of views of what the policy

issues are and how to best address those policy issues with solutions that can be supported by the consensus of the community, and;

3. The GNSO Council observes that the Working Group failed to reach agreement on several of the key issues identified in the charter of the Working Group, and;

4. That broadly, the scope of the issues in this area have evolved substantially over the term of this Policy Development Process since it was originally chartered, and;

5. A comprehensive, objective and quantifiable understanding of key factual issues regarding the gTLD WHOIS system will benefit future GNSO policy development efforts, and;

6. The rights and requirements of natural persons, anti-crime and law enforcement, registries and registrars in the areas of privacy, access, enforcement, investigation, consumer protection and research would benefit from future policy development by the GNSO.

THEREFORE, Be it resolved that the GNSO Council; 1. Sincerely thanks all of the volunteers, advisors, consultants, staff, stakeholders, observers and constituency participants who have contributed to the GNSO's examination of WHOIS policy over the last four years, and;

2. Formally ends the Policy Development Process on gTLD WHOIS without making any recommendations for specific policy changes to ICANN's Board of Directors, and;

3. Recognizes the demand for future policy development in several key areas and will immediately undertake to identify what specific policy development work is required and create a data-gathering and study plan to support this policy development no later than February 15th, 2008.

4. May initiate policy development activities in this area, as supported by the findings of the data-gathering and study activities upon their completion.

Norbert Klein noted that he disagreed, because it was not clear, what the inclusion of the amendment to the amendment would mean, adding the "legal community". What was intended by "legal community", Law Enforcement was a clear and identifiable entity in different national laws but "legal community" was a vague term which might create confusion.

Kristina Rosette commented that subject to the addition of a further minor amendment, and recognizing Norbert's question, she was happy to try and

work on some language that would be more specific and acceptable to Norbert, while still accomplishing her intended meaning.

Kristina proposed adding into the sixth "whereas" clause after "natural persons" and before "anticrime" -- "legal and business communities," recognizing that those were communities of persons and institutions that currently used WHOIS data and access and needed to have access to WHOIS data.

Kristina added that with more specificity regarding "legal professionals" such as the "legal and business communities" the friendly amendment would be acceptable.

Ross Rader commented that those communities were not intentionally left out and accepted the friendly amendment.

Robin Gross expressed concern by the additional words, because as Norbert Klein pointed out, a 'legal community' could be very broad, including not-so-ethical lawyers who wanted to send out not-so-legally-accurate cease and desist letters and drew attention to the chilling effects project.

Kristina Rosette expressed concern that the community was being broadened rather than narrowed down.

Chuck Gomes reported that discussions in the Registry Constituency indicated concerns about asking staff to do a series of studies that would be costly without knowing what the estimated costs were going to be. It would be helpful if the staff could provide cost estimates of the different elements of the studies so that Council could assess whether the value of the studies would justify the costs.

Avri Doria expressed similar concerns and rather than starting the studies "immediately" as noted in the motion, first, the terms of reference and scope of the studies should be well defined.

In addition, Council should be in a position to give the staff guidance on the study by the February date.

Avri also expressed concern about the word "immediately undertake".

Kristina Rosette commented that she would be amenable to deleting "immediately" given that the motion was already date-restricted with regard to February 15th. "Promptly" was offered as an alternative.

Ross Rader clarified that the purpose of the amendment was not to postpone WHOIS discussions but to kill the open-ended policy development process that Council had been engaged in for the last seven years and pick one or two very important aspects of that discussion and move forward policy development work, which included closing off the issue of extending publication exemptions to natural persons.

"Simply continuing with the status quo is not an acceptable answer. It is clear that there is not a consensus around that status quo and we need to recognize that and actively take action. So I am very much in favor of leaving this amendment as-is, to ensure that everyone is very clear that we have work

to do and that we are engaging in that work."

Liz Gasster, Senior Policy Counselor suggested, sequencing the study activities and shared the concerns about the broad and undefined practical aspects of the study. Liz appreciated Chuck Gomes's concern about the costs, and commented that staff would be prepared to do research on costs suggesting a two-part approach:

1. more specific direction from the Council about the scope of the studies once there were more detailed and accurate cost estimates
2. respond to further comments or direction that the council might have following the staff submission on estimated costs based on the scoping that the council might initially do to help guide the staff.

Robin Gross proposed a friendly amendment to No. 3 under the "therefore" that would read "3. Recognizes the demand for future policy development in several key areas, "Including the protection of the privacy rights of natural persons."

Kristina Rosette acknowledged **Robin's** concern but did not accept the friendly amendment.

Norbert Klein enquired why, accepting Robin's amendment would be a problem?

Kristina Rosette commented that it was too restrictive and would necessitate the addition of "appropriate access to data for rights enforcement, for consumer protection, for law enforcement anticrime, for legitimate business purposes such as, for example, facilitating the auctions of domain names at traffic and the like."

which she did not believe would be acceptable.

Chuck Gomes, temporarily in the chair, asked for clarification on Why Council was trying to identify the future policy work that needed to be done before there were any studies?

Jon Bing commented that there was justification for mentioning the data protection rights or privacy rights of individuals. In October, prior to the meeting, there were communications from the Article 29 Data Protection Working Group asking ICANN to contact them and to continue work on the issue which would be useful in relation to the application of the EU International Data Protection legislation with respect to WHOIS services.

Jon suggested that the Article 29 data Protection Working Group should be informed that although the policy development process was concluded, the specific issue had not been concluded. If this was not part of the recommendation, then the response to an invitation for cooperation around the question should be addressed separately.

Ross Rader reiterated that the purpose of the amendment was to rescope the engagement in the work rather than undertaking further studies and basing the policy development work on those studies. "I am strongly against just engaging in a broad study in the hopes that we will identify further work."

Chuck Gomes was supportive of ending the PDP.

Ross Rader commented that he had proposed motion 3 which was intended to bring the opposing parties together under a 'vague and distant threat, hoping that they would come to a compromise.'

Certain discussions indicated another option which was to engage in a narrowly defined study, because a broader study might result in a situation similar to the current one.

Avri Doria clarified that Motion 2 specified a schedule and instructions for the Council to start working on immediately and to produce responses by February 15th, while in Motion 1 or Motion 3, there were outstanding issues that Council and the ICANN legal staff would have to review if the motions passed.

Comments at the public microphone:

Milton Mueller, chair of the Non-Commercial users constituency, a previous Task Force member and sub-Working Group leader, commenting from the audience, expressed concern that the same list of conflicting interests that had been debated since 2000 would still be debated.

Council was offering no guidance to future studies with regard to what had been learned over the last seven years. Major media were watching the WHOIS process and expected a response from ICANN.

Milton made 3 suggestions

1. As **Jon Bing** pointed out, that the correspondence received from Data Protection Authorities, indicated that action should be taken with regard to natural persons, a key point where the working group actually reached some agreement such as forming a separate category.

2. Access mechanisms for whatever shielded data there was going to be, required studying. Clearly, this was a concern of the business and law enforcement communities. Access was difficult problem that should be earmarked.

3. Since there is experience with Country Code Top Level Domains that shield WHOIS data, a study should be requested on the impact on law enforcement and other problems that were associated or alleged to be associated with shielding WHOIS data.

The whereas clause in number 6,

"6. The rights and requirements of natural persons, anti-crime and law enforcement, registries and registrars in the areas of privacy, access, enforcement, investigation, consumer protection and research would benefit from future policy development by the GNSO."

Milton believed was a confession of confusion and papering over a rather miserable failure.

Jordyn Buchanan, who chaired various previous working groups and chaired the Task Force that produced the recommendation that was the subject of

motion 1, did not support more studies and believed that the open-ended way Motion 2 was currently presented was not useful. Gathering additional data based on specific questions would be more productive.

"I know everyone is well-intended here, but as Milton points out, we've been doing this for a long time. It may be there are places where we don't have data but the points of conflict, I think are very well understood and unlikely to be resolved by throwing more studies at it. In fact, that gives us yet another excuse to not make any substantive decisions on this process."

Steve DelBianco with NetChoice, a WHOIS Working Group and Commercial and Business Users Constituency member, was in favour of Ross Rader's amended motion.

"I would even like to acknowledge Milton Mueller and Robin for raising, over the past several years, the concerns that there are with respect to people who are afraid their privacy can't be protected on WHOIS.

Sounding the alarm like they did had the predictable effect of provoking the market to respond. Leading registrars to offer proxy services today that allow any natural person to naturally want to protect their identity by asking for a proxy. That is a market response. Another, is that many registrars will either shield the data that is in WHOIS through CAPTCHA mechanisms, technical mechanisms and other ways to stop the WHOIS information from being used for spam. Again, it is a market response that even the SSAC acknowledged can significantly reduce any incremental spam that might be coming out of the WHOIS display.

I conclude by saying that moving to conclude this PDP along the lines of Ross' motion is in no way an indictment of ICANN process or a failure of ICANN process. I think, rather, it shows that a process that cements into stone the assumptions of seven years ago and begins to solidify people's positions over a long period of time is not likely to serve the general interests of the Internet community.

Rather, it shows that on the Internet it is very easy for a process like this to be overcome by events. And that's particularly true when you look at how fast we move on Internet time."

Kristina Rosette proposed amending motion 2 in the "Whereas" clause:

3. Recognizes the demand for future policy development in several key areas and will immediately undertake to identify what specific policy development work is required and create a data-gathering and study plan to support this policy development no later than February 15th, 2008.

to:

3. Recognizes the demand for future policy development in several key areas, including but not limited to ensuring appropriate privacy safeguards for natural persons, appropriate access to data for rights enforcement, consumer protection, law enforcement and anti-crime purposes and other specifically

identified issues.

Robin Gross was concerned that the amended language was too broad and suggested changing "appropriate access" to "lawful access" so that there would be a legal right to have access to the information. It should be recognised that privacy rights needed to be addressed and Data Privacy Commissioners should be informed that work was progressing along these lines.

Tony Holmes expressed concern with the removal of "for appropriate access", commenting that it may be broad, but there was a broad set of issues that were not resolved. It appeared as though there was an attempt to narrow them down to people's particular specific concerns.

"I think we can waste a lot of time trying to do this because the reality is that we do have to face up to these things and that debate needs to take place in a new PDP, not in the current one. So I have a problem with that change." After considerable wordsmithing there was agreement that "appropriate access" be replaced with "lawful access".

Chuck Gomes offered a friendly amendment on Motion 2 which **Avri Doria** read into the minutes;

"Recognizes the demand for future policy development, including, but not limited to, ensuring appropriate privacy safeguards for natural persons, appropriate access for data for rights enforcement, consumer protection, law enforcement and anticrime purposes, and will immediately initiate the following sequential actions: 1: Council shall provide additional definitions regarding the potential data gathering and study requirements; 2: Staff shall provide the council with rough cost estimates for various components of data gathering and studies; 3) the council will decide what gait gathering and studies would be pursued; and 4) staff will perform the resulting data gathering and studies and report the results back to the council."

Chuck Gomes noted that a time limit was not included but that he did not object to one and agreed with **Avri Doria** to insert "No later than February 15th" into item 4), i.e. that staff would perform the relevant data gathering no later than February 15th, 2008.

Kristina Rosette accepted the friendly amendment.

Liz Gasster noted the request of the GAC on 30 October to have input on the contours of the studies, and that this might affect the timing of the study given the interval required for the GAC to provide input. Liz Gasster suggested the February 15th deadline be reconsidered if the GNSO wished to accommodate the GAC's request for providing input.

Ross Rader welcomed comments from all corners of the community but said “we do need to facilitate a very, very narrow and quick time line along these lines and I would hope that the GAC would be able to respond within those time lines. To the extent they can't, there will be further work on this issue going forward, further opportunity to liaise and comment on that, but I do not think it is appropriate for the council to narrow its time lines to specifically allow the GAC to tailor our study on specific issues.”

Bruce Tonkin, ICANN Board director speaking from the floor, observed that there were two distinct parts of Motion 2; one dealing with the conclusion of the current policy development process, which is set out in the bylaws, and the other commissioning some further work of the staff. Having consulted with ICANN's Deputy General Counsel, **Dan Halloran**, Bruce advised the Council to separate those two issues. Bruce said the Council needed to vote on whether to accept the policy recommendations resulting from the policy development process and report to the ICANN Board. If a supermajority vote was achieved, the report would go to the Board with a supermajority recommendation. If the supermajority vote was not reached, the report would still go to the Board as a Board Report, but with the positions of the different constituencies and the result of the vote. Given this, **Bruce** suggested the Council make a single motion resolving the PDP. **Bruce** recommended that regarding the motion specifying the data collection, the Council give it more thought and vote on it at the next meeting of council. This would give the Council time to consult and get the wording of the direction to staff, given the big cost implications. **Bruce** agreed with previous comments by **Milton Mueller** that it is necessary to bound the scope of further study and allow time to consult with constituents and the GAC.

Avri Doria noted that the Council had already done that by defeating Motion 1 which was the Task Force's recommendation for the OPOC and that this result would be put forward to the Board.

Avri said Motion 2 “basically puts another period on things being ended and recommends what's going on further” and also that the direction on further studies may make the recommendation to the Board richer and more content-rich. **Avri** said the Council could have just stopped with defeating Motion 1, if it wished, but that Motion 2 is essentially a continuing motion.

Milton Mueller, speaking from the floor, recommended that the Council not commission studies on the fly but rather scope them out carefully.

Avri Doria said that if she understood the motion correctly, it was “saying that we're going to provide additional definition regarding potential studies by February 15. It's not saying that that's done as of today.”

Ross Rader described the intent of the amendment he put forward; “that the Council will identify which specific areas we need further policy in, and only

when we have made that determination will we engage in further study, and that those areas of study will be specifically limited to those specific policy development activities. The causality, I believe, in the amendment is very, very clear that we will first look at the PDP and then ask the questions.”

Milton Mueller said that from what he saw of Motion 2, as amended, “it looked like you were saying specific things about the type of studies you wanted done. And what you're suggesting is that you -- you should not do that. You should wait. You should just say, "We'll do further studies" but you say nothing about what they are until you've thought about it more carefully.”

Chuck Gomes suggested that the Council postpone motions 2 and, by default, Motion 3, to do some more work and avoid crafting the scope on the fly.

Avri Doria said that with only 12 minutes left of assigned meeting time, and two agenda items tabled to the Council's next full meeting, that this could be considered. **Avri** noted that the Council had “essentially terminated the PDP by rejecting the recommendation of the task force and that the next two items essentially become recommendations for things to do next.”

Adrian Kinderis asked **Avri** to elaborate on "essentially defeated" noting that the motion either was defeated or it was not. We either have or we have not. **Avri Doria** responded that the Council did vote on the recommendation of the task force, saying no to OPC.

Ross Rader asked, to be “explicitly, painfully aware of what we've just not done, we have ended the PDP on WHOIS, is that correct?” He also asked to confirm that the Council has made no other decisions.

Avri Doria said that these were true.

Ross Rader said “I would like to enter into the record how explicitly disappointed I am in this forum for not moving this issue forward today. I do not think we have done the community any favors as a result of this discussion, and I'm only saying this because I'm leaving council today, and I would have hoped that we could have moved this issue forward.” **Ross** also hoped that the Council would move this issue forward in the future, saying “it just pains me that we are leaving this as unfinished business at this time.”

Chuck Gomes addressed **Ross**, saying his concern with regard to deciding on the policy issues could be easily inserted into the language **Chuck** had sent by making it the first action in the sequential action items. **Ross Rader** said he would be happy to consult with Council at any point in the future but that the discussion today “is very typical of the discussions that we've had on this, and it's not entirely a fruitful or productive discussion” and that he hoped the community could move beyond that.

Jordan Buchanan spoke from the floor, describing the motion as “profoundly silly” and asked why the Council was “spending time talking about procedure that doesn't actually advance the cause at all, which seems to be the only thing that this could possibly do?”

Adrian Kinderis said he shared **Jordan's** frustration. **Avri** said it was not silly because added to the comments the Council would include in the Board Report.

Olof Nordling reminded the Council that if a supermajority vote was not reached, a clear statement of all positions by Council members should be included in the Board Report, and asked Council to provide those. **Avri Doria** agreed and said the Board Report needs to include a clear statement of all of the councillors' positions on the issues and that it should include the motions that were not voted on.

Mike Rodenbaugh said he did not find Motion 2 to be silly either, except possibly the first part where he agreed with **Jordyn**. He said “It takes into consideration the views of almost every constituency that while we need to end the PDP on the terms that the task force came to, we still see obviously very significant issues with WHOIS in general. And while there is sure to be debate on what precisely the scope of the studies and the number of studies and the cost of studies that could be done to further inform the issue, almost all the constituencies have requested studies of various kinds, including the GAC, and so to ignore that I think would be silly.”

Kristina Rosette said she agreed with **Ross** that it was important to wrap up the issue, and suggested taking a five minute break and using additional time to keep going.

Avri Doria said the Council could vote on language, if it could agree to the language, and questioned whether the Council could manage “friendly amendments, amendments to the amendments, votes on the amendments, that whether we could actually complete all of that, even in the next half hour”.

Chuck Gomes suggested spending the remaining time on the two remaining agenda items and said he understood people's frustration as WHOIS had been a frustrating issue for six years.

Cyril Chua said the Council should go for a vote.

Alan Greenberg said that as the Council had ended the other PDP, it would be unconscionable to leave this room without a commitment to a task with a deadline on it.

Avri Doria said that if she could be told what wording Council would be voting on, she would have no problem calling the vote on Motion 2 at the moment.

Avri Doria asked **Kristina Rosette** if she accepted **Chuck's** proposal.

Kristina Rosette said she accepted **Chuck's** proposal.

Avri Doria said a quick amendment was needed on replacing appropriate access to lawful access and said she would call for a vote.

Avri Doria said the first vote is on the amendment and would be a roll call vote as it was the only way to replace appropriate access with lawful access in this clause.

Kristina Rosette accepted the change as a friendly amendment.

Ross Rader asked **Avri** to read out the motion. She said the clause that has been amended several times, 3, "recognizes the demand for future policy development, including, but not limited to, ensuring appropriate privacy safeguards for natural persons, lawful access to data for rights enforcement, consumer protection, law enforcement and anticrime purposes and will immediately initiate the following sequential actions: 1) council shall provide additional definition regarding the potential data gathering and study requirements no later than February 15th, 2008; 2) staff shall provide the council with rough cost statements for various components of data gathering and studies; 3) the council will decide what data gathering and studies would be pursued; and 4) staff will perform the resulting data gathering and studies and report the results back to council."

Chuck Gomes proposed a friendly amendment to his own, as it would not take until February 15th for the Council to provide additional definition. to carry this out.

Cyril Chua and **Kristina Rosette** accepted the friendly amendment.

Avri Doria began to take the roll call vote and took **Cary Karp's** vote, which was in favour.

Ross Rader intervened to say "this is not the amendment that I put forward in any way, shape, or form. I think procedurally, this discussion has been a disaster, and I'm completely withdrawing my original amendment at this point."

Mike Rodenbaugh said the amendment had been accepted as part of a motion and that **Ross** should have made a motion.

Ross Rader said that at the very least, he was making that statement for the record.

Avri Doria continued with the roll call vote.

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Avri Doria called for a roll call vote on motion 3 which would be included in the Board report with the vote.