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Appendix 1– Proposed Alternative Trigger

Absent a “Whois Proceeding”

Step One: Notification

Contracted party presents to ICANN a written statement from agency:

- (1) Specifying the facts before it, i.e.,
 - (a) the specific contracted party in question (registrar or registry)
 - (b) the applicable terms of service/registration agreements agency has reviewed
 - (c) the applicable provisions of the ICANN contract in question
 - (d) the applicable law it has analyzed
- (2) Identifying and analyzing the inconsistency agency has found between national law and contractual obligations, citing specific provisions of each
- (3) Certifying that agency has the legal authority to enforce the national law which it has found to be inconsistent with contractual obligations, and that it has jurisdiction over the contracted party for the purposes of such enforcement

Step Two: Consultation

In cases to which the Alternative Trigger applies, the Consultation Step includes a public consultation in which all interested parties can review the written statement submitted in the Notification Step and to comment on all aspects of it.

In such cases, ICANN would also consult with the GAC representative (if any) from the country in question, pursuant to section 2.1.2 of the procedure.

Appendix 2 – Written Legal Opinion (“Dual Trigger”) Alternative Trigger

The following is a redline of the existing procedure, incorporating the written legal opinion alternative.

ICANN Procedure For Handling WHOIS Conflicts with Privacy Law

Effective Date 17 January 2008

Introduction and background

0.1 In December 2003, [1] the WHOIS Task Force 2 of the GNSO recommended the development of a procedure to allow gTLD registry/registrar to demonstrate when they are prevented by local laws from fully complying with the provisions of ICANN contracts regarding personal data in WHOIS.

0.2 In November 2005 [2], the GNSO concluded a policy development process on establishing such a procedure. It follows the 'well-developed advice on a procedure' recommended by the WHOIS Task Force and approved by the GNSO Council. [3] In May 2006, the ICANN Board [4] adopted the policy and directed ICANN staff to develop and publicly document a conflicts procedure.

0.3 On 3 December 2006, ICANN staff published the Draft ICANN Procedure for Handling WHOIS Conflicts with Privacy Law¹. ICANN sought input on the draft procedure from the Governmental Advisory Committee (GAC). Revised language has been incorporated into 1.4 below.

0.4 On X June 2015 the Implementation Advisory Group on WHOIS conflicts with National Law² published its report outlining possible improvements to this procedure. Public comment was sought on the report of the advisory group from X to X 2015. The final report was submitted to the GNSO Council for consideration at its September 2015 Meeting.

0.5 The procedure outlined below details how ICANN will respond to a situation where a registrar/registry [5] indicates that it is legally prevented by local/national privacy laws or regulations from complying with the provisions of its ICANN contract regarding the collection, display and distribution of personal data via WHOIS. The procedure is for use by ICANN staff. While it includes possible actions for the affected gTLD registry/registrar, this procedure does not impose any new obligations on registries/registrars or third parties. It

¹ <http://gns0.icann.org/issues/whois-privacy/whois-national-laws-procedure.htm>

² <https://community.icann.org/display/WNLCL/WHOIS+and+national+law+conflicts+IAG+Home>

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aims to inform registries/registrars and other parties of the steps that will be taken when a possible conflict between other legal obligations and the ICANN contractual requirements regarding WHOIS is reported to ICANN.

1) Step One: Notification of WHOIS Proceeding

- a) At the earliest appropriate juncture, based on the receipt of either,
 - i) a written legal opinion from a nationally recognized law firm in the applicable jurisdiction that states that that national laws or statutes in the country of incorporation of a registrar might affect its compliance with the provisions of the Registrar Accreditation Agreement or other contractual agreement with ICANN dealing with the collection, display or distribution of personally identifiable data via WHOIS.
 - (1) Such written opinion shall
 - (a) specify the relevant applicable law, the allegedly offending elements, the manner in which the collection, display or distribution of such data violates applicable law, and a reasonable description of such determination and any other facts and circumstances related thereto,
 - (2) be accompanied by a copy of the Opinion and governmental ruling or guidance, as applicable, and
 - (3) be accompanied by any documentation received by Registrar from any governmental authority, in each case, related to such determination, and such other documentation reasonably requested by ICANN.

OR

- ii) a ruling of, or written guidance from, a governmental body of competent jurisdiction providing that compliance with the collection, display or distribution of personally identifiable data via WHOIS,
 - (1) such notice shall comprise the following elements:
 - (a) the specific contracted party in question (registrar or registry)
 - (b) the applicable terms of service/registration agreements agency has reviewed
 - (c) the applicable provisions of the ICANN contract in question
 - (d) the applicable law it has analyzed
 - (e) Identifying and analyzing the inconsistency agency has found between national law and contractual obligations, citing specific provisions of each
 - (f) Certifying that agency has the legal authority to enforce the national law which it has found to be inconsistent with contractual obligations, and that it has jurisdiction over the contracted party for the purposes of such enforcement

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(g) Stating that agency [intends to enforce] [is prepared to enforce] [would consider enforcing] that law against the contracted party unless contractual obligations are adjusted in a specified manner

b) a registrar/registry should contact ICANN to initiate the WHOIS proceeding. Additionally they should provide ICANN staff with the following

i) Summary description of the nature and status of the conflict and a range of possible outcomes

ii) information for the responsible official of the registrar/registry acting as the primary point of contact in the matter

iii) If appropriate, contact information for the authors of the legal opinion, the responsible territorial government agency or other claimant and a statement from the registrar/registry authorizing ICANN to communicate with those officials or claimants on the matter. If the registrar/registry is prevented by applicable law from granting such authorization, the notification should document this.

Depending on the specific circumstances of the WHOIS Proceeding, the

registrar/registry may request that ICANN keep all correspondence between the parties confidential pending the outcome of the WHOIS Proceeding. ICANN will ordinarily respond favorably to such requests to the extent that they can be accommodated with other legal responsibilities and basic principles of transparency applicable to ICANN operations.

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Step Two: Consultation

2.1 The goal of the consultation process should be to seek to resolve the problem in a manner that preserves the ability of the registrar/registry to comply with its contractual WHOIS obligations to the greatest extent possible.

2.1.1 Unless impractical under the circumstances, upon receipt and review of the notification, ICANN will consult with the registrar/registry. Where appropriate under the circumstances, ICANN may consult with the local/national enforcement authorities or other claimant together with the registrar/registry.

2.1.2 Pursuant to advice from ICANN's Governmental Advisory Committee, ICANN may request advice from the relevant national government on the authority of the request for derogation from the ICANN WHOIS requirements.

2.2 If the WHOIS Proceeding ends without requiring any changes or the required changes in registrar/registry practice do not, in the opinion of ICANN, constitute a deviation from the RAA or other contractual obligation, then ICANN and the registrar/registry need to take no further action.

2.3 If the registrar/registry is required by local law enforcement authorities or a court to make changes in its practices affecting compliance with WHOIS-related contractual obligations before any consultation process can occur, the registrar/registry should promptly notify ICANN of the changes made and the law/regulation upon which the action was based.

2.4 The registrar/registry may request that ICANN keep all correspondence between the parties confidential pending the outcome of the WHOIS Proceeding. ICANN will ordinarily respond favorably to such requests to the extent that they can be accommodated with other legal responsibilities and basic principles of transparency applicable to ICANN operations.

2.5 In cases where the proceedings are initiated by means of Section 1(a)(i), the Consultation Step shall include a public consultation in which all interested parties can review the written statement submitted in the Notification Step and to comment on all aspects of it. . Prior to release of the report to the public, the registry/registrar or ICANN may request that certain information (including, but not limited to, communications between the registry/registrar and ICANN, or other privileged/confidential information) be redacted from the report.

Step Three: General Counsel Analysis and Recommendation

3.1 If the WHOIS Proceeding requires changes (whether before, during or after the consultation process described above) that, in the opinion of the Office of ICANN's General Counsel, prevent compliance with contractual WHOIS obligations, ICANN staff may refrain, on a provisional basis, from taking enforcement action against the registrar/registry for non-compliance, while ICANN prepares a public report and

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recommendation and submits it to the ICANN Board for a decision. Prior to release of the report to the public, the registry/registrar may request that certain information (including, but not limited to, communications between the registry/registrar and ICANN, or other privileged/confidential information) be redacted from the report. The General Counsel may redact such advice or information from any published version of the report that relates to legal advice to ICANN or advice from ICANN's counsel that in the view of the General Counsel should be restricted due to privileges or possible liability to ICANN. Such a report may contain:

A summary of the law or regulation involved in the conflict;

Specification of the part of the registry or registrar's contractual WHOIS obligations with which full compliance is being prevented;

Summary of the consultation process if any under step two; and

Recommendation of how the issue should be resolved, which may include whether ICANN should provide an exception for those registrars/registries to which the specific conflict applies from one or more identified WHOIS contractual provisions. The report should include a detailed justification of its recommendation, including the anticipated impact on the operational stability, reliability, security, or global interoperability of the Internet's unique identifier systems if the recommendation were to be approved or denied.

3.2 The registrar/registry will be provided a reasonable opportunity to comment to the Board. The Registrar/Registry may request that ICANN keep such report confidential prior to any resolution of the Board. ICANN will ordinarily respond favorably to such requests to the extent that they can be accommodated with other legal responsibilities and basic principles of transparency applicable to ICANN operations.

Step Four: Resolution

4.1 Keeping in the mind the anticipated impact on the operational stability, reliability, security, or global interoperability of the Internet's unique identifier systems, the Board will consider and take appropriate action on the recommendations contained in the General Counsel's report as soon as practicable. Actions could include, but are not limited to:

Approving or rejecting the report's recommendations, with or without modifications;

Seeking additional information from the affected registrar/registry or third parties;

Scheduling a public comment period on the report; or

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Referring the report to GNSO for its review and comment by a date certain.

Step Five: Public Notice

5.1 The Board's resolution of the issue, together with the General Counsel's report, will ordinarily be made public and be archived on ICANN's website (along with other related materials) for future research. Prior to release of such information to the public, the registry/registrar may request that certain information (including, but not limited to, communications between the registry/registrar and ICANN, or other privileged/confidential information) be redacted from the public notice. The General Counsel may redact such advice or information from any published version of the report that relates to legal advice to ICANN or advice from ICANN's counsel that in the view of the General Counsel should be restricted due to privileges or possible liability to ICANN. In the event that any redactions make it difficult to convey to the public the nature of the actions being taken by the registry/registrar, ICANN will work to provide appropriate notice to the public describing the actions being taken and the justification for such actions, as may be practicable under the circumstances.

5.2 Unless the Board decides otherwise, if the result of its resolution of the issue is that data elements in the registry/registrar's WHOIS output will be removed or made less accessible, ICANN will issue an appropriate notice to the public of the resolution and of the reasons for ICANN's forbearance from enforcement of full compliance with the contractual provision in question.

Step Six: Ongoing Review

6.1 With substantial input from the relevant registries or registrars, together with all constituencies, ICANN will review the effectiveness of the process annually.

[1] Whois Task Force 2, Preliminary Report, June 2004; <http://gns0.icann.org/issues/whois-privacy/Whois-tf2-preliminary.html>

[2] GNSO Council minutes, 28 November 2005; <http://gns0.icann.org/meetings/minutes-gns0-28nov05.shtml>

[3] Final Task Force Report 25 October, 2005 of the GNSO Whois Task Force; <http://gns0.icann.org/issues/tf-final-rpt-25oct05.htm>

[4] Board minutes, 10 May, 2006; <http://www.icann.org/minutes/minutes-10may06.htm>

[5] Reference to 'registries' in this document includes registry operators and sponsoring organizations.

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Appendix 3 – ICANN Procedure For Handling Whois Conflicts with Privacy Law

Effective Date 17 January 2008

Introduction and background

0.1 In December 2003, [1] the Whois Task Force 2 of the GNSO recommended the development of a procedure to allow gTLD registry/registrar to demonstrate when they are prevented by local laws from fully complying with the provisions of ICANN contracts regarding personal data in Whois.

0.2 In November 2005 [2], the GNSO concluded a policy development process on establishing such a procedure. It follows the 'well-developed advice on a procedure' recommended by the Whois Task Force and approved by the GNSO Council. [3] In May 2006, the ICANN Board [4] adopted the policy and directed ICANN staff to develop and publicly document a conflicts procedure.

0.3 On 3 December 2006, ICANN staff published the Draft ICANN Procedure for Handling Whois Conflicts with Privacy Law [insert footnote, http://gns0.icann.org/issues/Whois-privacy/Whois_national_laws_procedure.htm].

ICANN sought input on the draft procedure from the Governmental Advisory Committee (GAC). Revised language has been incorporated into 1.4 below.

0.4 The procedure outlined below details how ICANN will respond to a situation where a registrar/registry [5] indicates that it is legally prevented by local/national privacy laws or regulations from complying with the provisions of its ICANN contract regarding the collection, display and distribution of personal data via Whois. The procedure is for use by ICANN staff. While it includes possible actions for the affected gTLD registry/registrar, this procedure does not impose any new obligations on registries/registrars or third parties. It aims to inform registries/registrars and other parties of the steps that will be taken when a possible conflict between other legal obligations and the ICANN contractual requirements regarding Whois is reported to ICANN.

(1) Step One: Notification of Whois Proceeding

1.1 At the earliest appropriate juncture on receiving notification of an investigation, litigation, regulatory proceeding or other government or civil action that might affect its compliance with the provisions of the Registrar Accreditation Agreement ("RAA") or other contractual agreement with ICANN dealing with the collection, display or distribution of personally identifiable data via Whois ("Whois Proceeding"), a registrar/registry should provide ICANN staff with the following:

- Summary description of the nature and status of the action (e.g., inquiry, investigation, litigation, threat of sanctions, etc.) and a range of possible outcomes.
- Contact information for the responsible official of the registrar/registry for resolving the problem.
- If appropriate, contact information for the responsible territorial government agency or other claimant and a statement from the registrar/registry authorizing ICANN to communicate with those officials or claimants on the matter. If the registrar/registry is prevented by applicable law from granting such authorization, the notification should document this.
- The text of the applicable law or regulations upon which the local government or other claimant is basing its action or investigation, if such information has been indicated by the government or other claimant.
- Description of efforts undertaken to meet the requirements of both local law and obligations to ICANN.

1.2 Meeting the notification requirement permits registrars/registries to participate in investigations and respond to court orders, regulations, or enforcement authorities in a manner and course deemed best by their counsel.

1.3 Depending on the specific circumstances of the Whois Proceeding, the registrar/registry may request that ICANN keep all correspondence between the parties confidential pending the outcome of the Whois Proceeding. ICANN will ordinarily respond favorably to such requests to the extent that they can be accommodated with other legal responsibilities and basic principles of transparency applicable to ICANN operations.

1.4 A registrar or registry that is subject to a Whois proceeding should work cooperatively with the relevant national government to ensure that the registrar or registry operates in conformity with domestic laws and regulations, and international law and applicable international conventions.

(2) Step Two: Consultation

2.1 The goal of the consultation process should be to seek to resolve the problem in a manner that preserves the ability of the registrar/registry to comply with its contractual Whois obligations to the greatest extent possible.

2.1.1 Unless impractical under the circumstances, upon receipt and review of the notification, ICANN will consult with the registrar/registry. Where appropriate under the circumstances, ICANN will consult with the local/national enforcement authorities or other claimant together with the registrar/registry.

2.1.2 Pursuant to advice from ICANN's Governmental Advisory Committee, ICANN will request advice from the relevant national government on the authority of the request for derogation from the ICANN Whois requirements.

2.2 If the Whois Proceeding ends without requiring any changes or the required changes in registrar/registry practice do not, in the opinion of ICANN, constitute a deviation from the RAA or other contractual obligation, then ICANN and the registrar/registry need to take no further action.

2.3 If the registrar/registry is required by local law enforcement authorities or a court to make changes in its practices affecting compliance with Whois-related contractual obligations before any consultation process can occur, the registrar/registry should promptly notify ICANN of the changes made and the law/regulation upon which the action was based.

2.4 The registrar/registry may request that ICANN keep all correspondence between the parties confidential pending the outcome of the Whois Proceeding. ICANN will ordinarily respond favorably to such requests to the extent that they can be accommodated with other legal responsibilities and basic principles of transparency applicable to ICANN operations.

(3) Step Three: General Counsel Analysis and Recommendation

3.1 If the Whois Proceeding requires changes (whether before, during or after the consultation process described above) that, in the opinion of the Office of ICANN's General Counsel, prevent compliance with contractual Whois obligations, ICANN staff may refrain, on a provisional basis, from taking enforcement action against the registrar/registry for non-compliance, while ICANN prepares a public report and recommendation and submits it to the ICANN Board for a decision. Prior to release of the report to the public, the registry/registrar may request that certain information (including, but not limited to,

communications between the registry/registrar and ICANN, or other privileged/confidential information) be redacted from the report. The General Counsel may redact such advice or information from any published version of the report that relates to legal advice to ICANN or advice from ICANN's counsel that in the view of the General Counsel should be restricted due to privileges or possible liability to ICANN. Such a report may contain:

1. A summary of the law or regulation involved in the conflict;
2. Specification of the part of the registry or registrar's contractual Whois obligations with which full compliance is being prevented;
3. Summary of the consultation process if any under step two; and
4. Recommendation of how the issue should be resolved, which may include whether ICANN should provide an exception for those registrars/registries to which the specific conflict applies from one or more identified Whois contractual provisions. The report should include a detailed justification of its recommendation, including the anticipated impact on the operational stability, reliability, security, or global interoperability of the Internet's unique identifier systems if the recommendation were to be approved or denied.

3.2 The registrar/registry will be provided a reasonable opportunity to comment to the Board. The Registrar/Registry may request that ICANN keep such report confidential prior to any resolution of the Board. ICANN will ordinarily respond favorably to such requests to the extent that they can be accommodated with other legal responsibilities and basic principles of transparency applicable to ICANN operations.

(4) Step Four: Resolution

4.1 Keeping in mind the anticipated impact on the operational stability, reliability, security, or global interoperability of the Internet's unique identifier systems, the Board will consider and take appropriate action on the recommendations contained in the General Counsel's report as soon as practicable. Actions could include, but are not limited to:

- Approving or rejecting the report's recommendations, with or without modifications;
- Seeking additional information from the affected registrar/registry or third parties;
- Scheduling a public comment period on the report; or
- Referring the report to GNSO for its review and comment by a date certain.

(5) Step Five: Public Notice

5.1 The Board's resolution of the issue, together with the General Counsel's report, will ordinarily be made public and be archived on ICANN's website (along with other related materials) for future research. Prior to release of such information to the public, the

registry/registrar may request that certain information (including, but not limited to, communications between the registry/registrar and ICANN, or other privileged/confidential information) be redacted from the public notice. The General Counsel may redact such advice or information from any published version of the report that relates to legal advice to ICANN or advice from ICANN's counsel that in the view of the General Counsel should be restricted due to privileges or possible liability to ICANN. In the event that any redactions make it difficult to convey to the public the nature of the actions being taken by the registry/registrar, ICANN will work to provide appropriate notice to the public describing the actions being taken and the justification for such actions, as may be practicable under the circumstances.

5.2 Unless the Board decides otherwise, if the result of its resolution of the issue is that data elements in the registry/registrar's Whois output will be removed or made less accessible, ICANN will issue an appropriate notice to the public of the resolution and of the reasons for ICANN's forbearance from enforcement of full compliance with the contractual provision in question.

(6) Step Six: Ongoing Review

6.1 With substantial input from the relevant registries or registrars, together with all constituencies, ICANN will review the effectiveness of the process annually.

[1] Whois Task Force 2, Preliminary Report, June 2004;

<http://gns0.icann.org/issues/Whois-privacy/Whois-tf2-preliminary.html>

[2] GNSO Council minutes, 28 November 2005; <http://gns0.icann.org/meetings/minutes-gns0-28nov05.shtml>

[3] Final Task Force Report 25 October, 2005 of the GNSO Whois Task Force; <http://gns0.icann.org/issues/tf-final-rpt-25oct05.htm>

[4] Board minutes, 10 May, 2006; <http://www.icann.org/minutes/minutes-10may06.htm>

[5] Reference to 'registries' in this document includes registry operators and sponsoring organizations.

Appendix 4 – Minority Views

4.1 Statement of Christopher Wilkinson, IAG Member

I. Background and Status of the Report

While thanking other members of the IAG and the ICANN staff for their work during the past eight months, I have to express my disappointment and disagreement with the report as it stands³. To present this to the GNSO and the ICANN Board would fail both to address the implementation issues that have already been encountered with the existing policy and to present a balanced account of the arguments that have been developed during the IAG's work.

Allow me to recapitulate the principle objections to the report that I have already evoked in the conference calls in which I have been able to participate, and on the mailing List: 1. **The 2005 GNSO policy** referred to in Section 3.1.1 is not a consensus policy in any sense of the word. The report admits that “the Whois Procedure has not been invoked and yet numerous concerns have arisen from contracted parties and the wider community.” In short, the original procedure allowing “exception(s) to contractual obligations ...” has failed. 2. During the May conference call, anticipating that the IAG report might not resolve the problems, I asked for a vote among all IAG members on the mailing list to determine whether this report is in fact a majority report of the WG or a minority report. Although I had understood that the ICANN staff had conceded that a vote was appropriate, no such vote has been undertaken. **I maintain my request for a vote.**

II. Specific comments and observations 3. Although the proposed **Alternative Trigger (Appendix 1)** is an improvement on the present situation, and vastly to be preferred to the “Dual Trigger” (Appendix 2), it still leaves a great deal to be desired: (a) The (repeated) references to **'national' law** casually dismiss the fact that in the European Union the relevant laws are regional in character. The text should refer throughout to 'applicable local law'; (b) The (repeated) references to **'enforcement'** ignore the fact that the entities responsible for

authoritative interpretation of applicable law are not necessarily the same as the entities responsible for enforcement. The language used in the report casually dismisses the relevance of the European and national data protection agencies throughout the EU.

(c) The Alternative Trigger proposal still maintains that **each Registry or Registrar would have to individually request a specific exemption**. That would be unjustifiably onerous, costly and time-consuming. I have asked ICANN and IAG to consider a system of 'block exemption' whereby all the contracted parties within the same jurisdiction would receive the same exemption on the basis of a single procedure. Ideally, in the case of the European Union, all contracted parties incorporated in the EU Member States would benefit from a single exemptions. There are, furthermore, sound **competition grounds for an uniform collective approach**. Under the proposed Alternative Trigger, different contracting parties would be operating under different contract conditions, of varying exigence, at least for a long time to come. Meanwhile, this would tend to distort the domain name market and face Registrants with invidious distinctions depending on whether or not their Registrar had received an exemption.

(d) Regarding the proposed **public consultation phase**, I confess to entertain a certain scepticism. Although it may go against the grain in the ICANN context, I have to say that the general public world wide, and even most of the ICANN community would expect operators such as Registries and Registrars to respect the law (even without the threat of 'enforcement'). They would not expect to be invited to review and comment on written statements from the competent authorities on such a specific legal and technical matter case by case, as the requests for individual exemptions came through the process.

Rather I would suggest that the only interested parties who would wish to comment would tend to be those critics of privacy and data protection policies, who appear to have been responsible for adopting the original 2005 Whois policy, which is at the source of the problems that have had to be addressed by the IAG today.

III. An alternative Whois policy

For the sake of completeness, may I also recall that I had proposed that the IAG consider two further options: - that ICANN should **adopt, globally, international Best Practice** in the matter of Privacy policy and Data Protection. This is not so far fetched: there are several other areas of policy and practice where ICANN applies a higher bar to performance than that which would be required elsewhere. And should continue to do so. - alternatively, in the matter of exemptions from contract conditions, one could **reverse the burden of proof**. That is, the primary default would be that the contracted party would conform to applicable local law, and that ICANN would have the option to initiate a contrary procedure should it deem that the stability and security of the Internet and the DNS would otherwise be prejudiced. In this context one may note that numbers of ccTLD Registries and their Registrars do already conform to applicable local law; to the best of my knowledge this practice has never been challenged by ICANN as prejudicing stability and security in any way. However, ICANN staff have issued the opinion that the mandate of the IAG-Whois excludes consideration of alternative and improved policies, which is why the IAG has been obliged to spend a lot of time discussing the implementation of a policy which is seriously flawed in the first place

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In the light of the above, may I once again invite ICANN and the IAG to reconsider the content of the report in question. I shall determine my definitive position in this respect, thereafter.

ICANN is currently being challenged to be accountable to the Community. For present purposes the relevant Community are all the Registrants of all the contracting parties whose personal data is not being protected in conformity with applicable local law consequent on ICANN's contractual conditions, as applied to Whois.

4.2 Statement of Stephanie Perrin, IAG Member

I have requested that this statement be included in the report, because it is my view that the report does not reflect even rough consensus of how to proceed on the matter of WHOIS conflicts with law. The statement of Christopher Wilkinson (Appendix 3) makes many of the same points which I feel compelled to raise. I will try to avoid unnecessary repetition.

Operations of the WHOIS conflicts WG

It is bizarre that we are tasked with discussing how to improve a process that has never been invoked, without addressing the fundamentally flawed policy which the process seeks to implement. A tremendous amount of discussion was held in which many stakeholders (I would agree with Christopher Wilkinson, and say the majority) pointed out the flaws in the policy.

The process has not been invoked largely, in my view, because the pressure has been taken off data protection law as a mechanism for registrants to protect their privacy. Registrants make use of privacy proxy services to protect their data. If the current work of the Privacy Proxy Services Accreditation Issues Working Group (PPSAI-WG) comes to fruition, there will be more requirements demanded of service providers, and it may become more difficult/expensive for registrants to keep their personal data out of the WHOIS directory. If this were to transpire, it seems likely to me (and I will admit that this is speculation at this point) that registrants may take an interest in complaining about the failure of registrars to comply with data protection law. The fact that this situation does not apply in the US because of the lack of applicable data protection law does not make it irrelevant, despite the fact that ICANN is a California corporation. Data protection law now applies in over 101 countries³, and it seems far more logical, and compliant with ICANN's obligations to act in the public interest, to comply with law rather than persist in demanding the disclosure of personal information in a public directory unless a competent authority threatens to enforce the law. To insist on a policy that does not acknowledge the growing reality of data

³ Greenleaf, Graham. 2015. Asian Data Protection Law: Trade and Human rights Perspectives, p. 6-7. Citing his footnote 7, "The geographical distribution of the current 101 laws by region is: EU (28); other European (27); Asia (12); Latin America (9); Africa (11); North Africa/Middle East (6); Caribbean (4); North America (2); Australasia (2); Central Asia (2); Pacific Islands (0)."

protection as it applies to Internet Governance is, in my view, not acting in the public interest or in accordance with ICANN’s responsibilities.

The question immediately arises, and of course has been debated at length in our group, “How do you know that the practice of putting the data in WHOIS is not in compliance with law, absent an enforceable order?” Quite simply, the two most relevant associations of global data protection authorities, the Article 29 Working Party on Data Protection⁴, and the International Working Group on Data Protection in Telecommunications and Media (IWGDPT) have said so. They have been expressing their concerns about WHOIS to ICANN since 1998. The following table outlines their publications and letters on various WHOIS-related matters.

Interventions of international Data Protection Authorities relating to ICANN			
DATE	AUTHOR	TITLE	DESCRIPTION
1998	IWGDPT	Common position on Reverse Directories	Consent and transparency required Referenced in Art 29 re WHOIS
2000	IWGDPT	Common position on WHOIS	State purpose, restrict data published, restrict marketing and secondary use
2000	IWGDPT	Ten commandments for privacy on the Internet	Virtual right to be let alone restricts directory listings
2001	Art 29 WP	Comments to EC on WHOIS	EC requested comments on WIPO issues and WHOIS
2003	EC DG15 ⁵	Comments on WHOIS	Notes reverse directories, purpose
2003	IWGDPT	Letter to ICANN re Names Council WHOIS task force	Notes earlier interventions, purpose
2003	Art 29 WP	Opinion on WHOIS 2/2003	Summary of views
2005	IWGDPT	Letter to IWGIG ⁶ to express interest in cooperation	Explains who they are and that they are interested in Internet issues
2006	Art 29 WP	Letter to ICANN (Cerf) re	Expresses same concerns

⁴ The Article 29 Working Party was established through the authority of Article 29 of the European Data Protection Directive 95/46. It is supported by the European Commission, elects its Chairman, meets regularly, and is tasked with harmonizing the approach to the determination of adequacy of relevant data protection law, for the purposes of onward transfers of the data of EU citizens. The group also attempts to reach common positions on the interpretation of data protection law with respect to critical issues.

⁵ European Commission, DG 15 or Internal Market, responsible for the Data Protection Directive 95/46

⁶ International Working Group on Internet Governance

		WHOIS review	
2013	Art 29 WP	Letter to Crocker re 2013 RAA & waivers	All 26 data commissioners agree that their registrars will require a waiver of RAA requirements re WHOIS
2014	Art 29 WP	Letter to ICANN re their status and 2013 RAA	Reaffirms that Art 29 group has authority, all DPAs represented and can sign
2014	EDPS ⁷	Letter to ICANN re data retention and recent decision of ECJ	Data retention practices required by RAA are not in compliance with EU Charter of Rights

To the best of my knowledge, ICANN has not responded to the last letter from the elected Chairman of the Article 29 Working party, assuring ICANN that it has the authority to speak for all of the data commissioners in the EU and that they all agree that their registrars require a waiver. Why, in the face of this evidence, would ICANN persist in having a working group debate how to improve the trigger mechanisms? Why not harmonize around this response, and change the policy? Why create unfair competitive advantage in the registrar community? Given the importance of privacy to most Internet users, why would ICANN not level the playing field and make the default privacy?

The Trigger Mechanisms

The existing policy and trigger mechanisms reflect at best a basic failure to comprehend the way data protection law works, at worst a determination to be as difficult and intransigent as possible. Most data protection authorities do not provide advice as to how they view a data protection issue, they issue findings upon receipt of a complaint. Requiring that a registrar produce a letter from a data protection authority indicating that compliance with contractual requirements is against the law in most situations means they would have to break the law, get someone to complain, and be found guilty (and liable to fines). This would produce a letter of finding, from a competent authority, with details as to how the matter would be

⁷ European Data Protection Supervisor, responsible for oversight of the European Commission, the European Parliament and related European institutions with respect to their compliance with applicable data protection law. The Office also has a key role in consultation and cooperation to ensure a harmonized approach to compliance with applicable data protection law.

enforced. This can hardly be a satisfactory situation for the registrar stakeholder group, however, particularly given the fact that if there is publicity about the case, many more complaints may ensue.

This is not at all satisfactory from the perspective of the client or registrant, she whom (I would argue) ICANN has a fiduciary responsibility to protect. Once the data is out, even without the many value added service providers who feed off WHOIS data, the privacy breach is permanent because of the nature of the Internet.

All of the new proposed trigger mechanisms which we canvassed within the group, in my view, are inadequate. A letter from a competent nationally recognized law firm could work, if it were simply taken at face value. However, unless ICANN is in the business of keeping global law firms financially sound, there is no reason whatsoever to insist that every registrar go through this. Surely the law applies equally to all?

There is a suggestion that the opinions of the GAC representatives of the countries ought to be sought. With all due respect to the GAC, it seems quite clear that the representatives of the various governments who attend ICANN are rarely the relevant data protection authorities, or the relevant constitutional and data protection lawyers in the ministries of justice who could knowledgeably opine on the matter. Furthermore, the data commissioners are often in the position of oversight and enforcement on their governments, so it is problematic to ask the advice of GAC members who represent those interests, as to whether the opinion or finding of an independent data protection authority is to be believed. Once again, if the views of the data commissioners are not considered to be sufficient authority, the matter must be taken to a higher Court.

In my view, ICANN should not be pushing matters relating to national or regional law to the relevant higher courts in each jurisdiction. This strikes me as an abuse of its power as a contracting authority charged with administering the DNS.