



STAFF OVERVIEW OF RECENT GNSO WHOIS ACTIVITIES

11 October, 2007

STATUS OF THE DOCUMENT

Staff Overview for GNSO Council consideration

SUMMARY

This document represents ICANN staff's overview of the activities of the WHOIS Task Force and WHOIS Working Group, prepared as directed by the GNSO Council Resolution of 6 September, 2007, calling for staff to prepare a "Final Report" including constituency statements by 11 October, 2007.

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I. Introduction

This document was prepared in response to the GNSO resolution of 6 September, 2007, which, among other things, directed staff to prepare a Final Report¹ that references the WHOIS Task Force Report, the WHOIS Working Group Charter and the Working Group Report, and incorporates Constituency comments and any other factual information by 11 October, 2007.

Staff has also included in this document an overview of the initial OPOC proposal considered by the WHOIS Task Force and a summary of the additional related issues considered by the WHOIS Working Group, described further in Section V.

II. Background on activities of the WHOIS Task Force and Working Group

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://gnso.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). In the final report, a simple majority of members of the WHOIS Task Force endorsed this proposal (The proposal was supported by the Registry Constituency, the Registrar Constituency, the Non Commercial User Constituency and the Nominating Committee appointee. The OPOC proposal was also supported by the non-voting At Large Liaison to the Task Force.)

¹ This Staff Overview of Recent GNSO WHOIS activity is intended to fulfill the resolution passed by the GNSO Council on 6 September for a 'Final Report'. The title was changed so as not to create confusion with the Final Report as that term is used in the PDP in the Bylaws.



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As set forth in the initial OPOC proposal considered by the TF, every registrant would identify a new operational contact which would be published in WHOIS in lieu of the administrative and technical contact information currently displayed. In response to WHOIS queries regarding specific domain names, ICANN-accredited Registrars would display full contact information for the OPOC (name, address, telephone number and email address) but only the registrant's name and country/jurisdiction. 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. The OPOC proposal considered by the Task Force also set forth means for correcting inaccurate WHOIS data, and for facilitating inter-registrar domain name transfers. The initial OPOC proposal is included in Section 4 of the Task Force Report (see link below).

If implemented, the OPOC proposal would apply to the WHOIS services operated by all ICANN-accredited registrars and all gTLD registries. All Registries would become "thin" registries, only publishing a limited data set for each registration.

Proponents of a new OPOC position identified several benefits:

- to reduce the amount of public data that could be used for undesirable purposes such as phishing, spam and consumer fraud
- to simplify the registration process and eliminate confusion around multiple contacts whose functions are difficult to distinguish
- to encourage registrants to submit accurate data and to improve the means for notifying and correcting WHOIS data
- to accommodate the privacy concerns of natural persons (real, live individuals) and ensure adherence with relevant national privacy laws

Concerns about the implications of implementing an OPOC included:

- The OPOC could make contacting the registered name holder more difficult, time-consuming, expensive or less reliable
- Responsibilities and obligations of the OPOC would need to be clearly defined, including accelerated time frames for response
- Mechanisms would be needed to encourage compliance and provide enforcement, including timely alternative mechanisms for access to unpublished information

Some broad directions for development of the Task Force policy recommendations that were raised through the public comments:

- The OPOC should ensure contact with the registered name holder in a defined and short period of time.
- OPOCs should have specified responsibilities for passing communications, including legal notifications, to the registered name holder. Any other responsibilities must also be clearly defined.
- There need to be clear, consistent, timely and predictable procedures for obtaining access to unpublished data.

The final WHOIS Task Force Report of 12 March, 2007 is posted at <http://gnso.icann.org/issues/WHOIS-privacy/WHOIS-services-final-tf-report-12mar07.htm>.



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The GNSO Council met to consider the WHOIS Task Force Report on Sunday, 25 March 2007. Various concerns were raised about recommendations made in the report, and when the GNSO Council met again on 28 March, it approved a resolution creating a WHOIS Working Group (WG) to examine three issues raised in the Task Force Report and to make recommendations concerning how the OPOC proposal might be improved to address these issues:

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 registration data no longer published via WHOIS; and
3. to examine whether publication of registration contact information should be based on the type of registered name holder (legal vs. natural persons²) or the registrant's use of a domain name.

In examining these issues, the working group sought an outcome that would improve the privacy aspects of WHOIS for natural persons and maintain the ability of legitimate parties to respond in a timely manner against fraud and other illegal acts by certain registrants acting in bad faith. While the WG worked to achieve rough consensus, it did not conduct votes. Some statements are preceded by the term AGREED. These statements are an agreed policy recommendation of this group. Some statements are qualified by a characterization of SUPPORT or ALTERNATIVE VIEW. Points of agreement are noted based on the majority outcome of a series of issue-based discussions, held either by telephone conference or at one physical meeting, subsequently subject to group review. Working with the group, the Chair had the authority to establish where agreement/support/alternative views existed.

The Working Group used the following conventions:

Agreed – there is broad agreement expressed by the contributing members of the working group though not necessarily unanimity (This agreement is majority-based and no attempt was made to categorize agreement by interest group because participation had not been solicited or organized by interest group);

Support – there is a gathering of positive opinion, but a range of alternative views exist and broad agreement was not reached;

Alternative views – differing opinions expressed in relation to the characterizations of Support or Agreed, or opinions about other Alternative views.

Though the WG did reach agreement on certain points as defined in the WG report, there are important aspects of the proposal that were understood to require more definition and structure if implemented. For these reasons, the WG also identified key implementation options. Implementation issues were discussed extensively by the WG, and it became clear that given the nature of the OPOC proposal, important nuances in implementation were of great significance to the WG and would have a great affect on levels of support for the overall proposal. This is also reflected in various statements of agreement, support and alternative views.

The WHOIS Outcomes Working Group Report was finalized on 20 August, 2007 and has been forwarded to the GNSO Council for consideration. It is posted at <http://gnso.icann.org/drafts/icann-WHOIS-wg-report-final-1-9.pdf>

² The term "natural person" is used in the Working Group Report to mean a real, living individual. The term "legal person" is used in the Working Group Report to mean a company, business, partnership, non-profit entity, association, etc. (Sec. 5.2)



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The GNSO Council has discussed WHOIS twice since then, first on 30 August and again on 6 September 2007. On the 6 September call, a resolution was approved establishing the schedule for consideration of the Working Group Report, in conjunction with the earlier WHOIS Task Force Report, completed last March. The schedule for consideration calls for a final vote by the GNSO Council during the LA public GNSO meeting. The full text of the resolution, including the schedule, is reprinted in Section III.

This resolution also directed staff to proceed with a study on gTLD registrations and registrants and how WHOIS data is used and misused as described in the GAC Principles of 28 March, and to provide updates to the GNSO Council on ICANN's WHOIS data accuracy audit that is currently underway and an update on the SSAC study presented on 28 September 2006, which examined the extent to which personal contact information can be extracted from registration records. Lastly, the motion directs staff to produce a final report that incorporates constituency statements any other factual information by 11 October.

This ICANN Staff Overview of Recent WHOIS Activities is provided to the GNSO Council in response to its request for a "Final Report" by 11 October, and includes those constituency statements which have been received to-date. Staff Implementation Notes on the WHOIS Working Group Report are also being submitted to the GNSO Council on 11 October to help inform the Council of implementation issues as it considers both reports. The SSAC will be providing the GNSO Council with an update to the September 2006 study during the upcoming ICANN public meeting in Los Angeles. The ICANN Compliance Group will also be presenting an update on its pending WHOIS data accuracy audit at that time.

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III. Text of Motion approved by the GNSO Council 6 September, 2007

Whereas the WHOIS WG has now completed its work,

Therefore;

The GNSO Council accepts the WG report and appreciates the efforts made by WG participants and ICANN staff in preparing this report.

Further, the GNSO council:

a) graciously thanks all of the volunteers, consultants, staff and others who have participated in the Task Force and Working Group.

b) makes no specific policy recommendation to the ICANN board at this time concerning WHOIS or related policy.

c) requests ICANN Staff proceed with a study of gTLD registrations and registrants and how WHOIS data is used and misused as described in the GAC Principles Regarding gTLD WHOIS Service paragraph 4.2, and by the Working Group Final outcomes report. This study should include a review and analysis of the different proxy services available today and a summary of any other statistical studies that Staff can locate. We ask staff to report back to the council on the 'study to date' by October 4.

d) requests an update on the WHOIS Data Accuracy Program outlined by ICANN Staff on April 27th, including any statistical information that can be summarized thus far. See <http://www.icann.org/WHOIS/WHOIS-data-accuracy-program-27apr07.pdf>.

e) requests an update on the pending SSAC study on "Information Gathering Using Domain Name Registration Records" outlined in September, 2006. See <http://www.icann.org/committees/security/information-gathering-28Sep2006.pdf>

f) shall review any additional factual information, in conjunction with the policy suggestions from the Task Force and Working Group reports, complete this work on WHOIS, and make a report to the ICANN community and to the ICANN Board, as follows:

1 - Staff will produce a Draft Final Report that references the TF report, the WG charter and the WG report and which includes an overall description of the process by September 13. This overview should include the text of motions to be voted on at the end of this process.

2 - This report will be sent out for Constituency Statement Review on September 13. Constituencies will be asked to follow the by-laws on constituency statements. Specifically:

Constituency Statements. The Representatives will each be responsible for soliciting the position of their constituencies, at a minimum, and other comments as each Representative deems appropriate, regarding the issue under consideration. This position and other comments, as applicable, should be submitted in a formal statement to the Council list and to the ICANN Policy Lead (each, a "Constituency Statement") within twenty one (21) calendar days after initiation of the PDP.

Every Constituency Statement shall include at least the following:



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(i) If a Supermajority Vote was reached, a clear statement of the constituency's position on the issue;

(ii) If a Supermajority Vote was not reached, a clear statement of all positions espoused by constituency members;

(iii) A clear statement of how the constituency arrived at its position(s). Specifically, the statement should detail specific constituency meetings, teleconferences, or other means of deliberating an issue, and a list of all members who participated or otherwise submitted their views;

(iv) An analysis of how the issue would affect the constituency, including any financial impact on the constituency; and

(v) An analysis of the period of time that would likely be necessary to implement the policy.

**Final Date for updated constituency statements: October 4, 2007

3 - Staff will Incorporate Constituency comments and any additional factual information into Final Report by October 11, 2007

4 - Staff is requested to produce staff implementation notes by October 15

5 - Community Public Comment on Final Report: October 15 - 31, 2007

6 - A Public and Council Discussion will be held during the LA Public Meeting

7 - Final vote during the LA public GNSO meeting.



IV. Text of motions offered to-date that may be voted on at the end of the process

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 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.



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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.



V. Overview of OPOC proposal as considered by the Task Force and summary of issues considered by the Working Group

The purpose of this chart is to convey at a high level the components of the initial OPOC proposal considered by the WHOIS Task Force, and the areas of further consideration that were subsequently explored by the WHOIS Working Group. As directed by Charter, the WG only considered certain questions, largely focused on the OPOC’s responsibilities and what happens if those functions are not fulfilled. Thus, the WG did not re-consider each aspect of the initial OPOC proposal. Instead it attempted to answer three specific questions asked by the GNSO Council about the OPOC proposal.

Regarding the Working Group Report, note that some statements are preceded by the term AGREED. These statements are an agreed policy recommendation of this group. Some statements are qualified by a characterization of SUPPORT or ALTERNATIVE VIEW. Points of agreement are noted based on the majority outcome of a series of issue-based discussions, held either by telephone conference or at one physical meeting, subsequently subject to group review. Working with the group, the Chair had the authority to establish where agreement/support/alternative views existed.

The Working Group used the following conventions:

- Agreed – there is broad agreement expressed by the contributing members of the working group though not necessarily unanimity (This agreement is majority-based and no attempt was made to categorize agreement by interest group because participation had not been solicited or organized by interest group);
- Support – there is a gathering of positive opinion, but a range of alternative views exist and broad agreement was not reached;
- Alternative views – differing opinions expressed in relation to the characterizations of Support or Agreed, or opinions about other Alternative views.

Initial OPOC Proposal	Summary of WG topics considered
<p>General points: The OPOC proposal considered by the WHOIS Task Force pre-supposes that 1) domain name contact data not be available through any sources other than those discussed by this proposal, unless by Registrars, and in that case at the Registrar's option, and that 2) regardless of the information displayed, the domain name contact data collected by registrars remain as specified in the RAA ("Underlying WHOIS Contact Data").</p>	<p>General points: The WG considered aspects of the OPOC, as directed by the WG Charter, that expand on the “purpose of the OPOC” envisaged initially. These are highlighted below with citations to full text. As a threshold matter, the Report notes that implementing an OPOC would change the way certain data is collected, displayed and accessed, resulting in increased costs for service providers and delays for requesters of unpublished WHOIS data, compared with the status quo. The WG agreed that only the contact information of registrants who are natural persons (real, living individuals) would no longer be published. This issue was not considered in the initial OPOC proposal.</p>
<p>Purpose of the OPOC: The purpose of the OPOC is to resolve, or to reliably pass on data to resolve, operational issues relating to a domain name. At minimum, this must include the resolution of issues relating to the configuration of the</p>	<p>Potential roles of OPOC:</p> <ul style="list-style-type: none"> • to relay a request to a registrant. Agreement that relay must be timely and meet key requirements (3.1) • to reveal unpublished registrant information to a requester. Also must be timely and meet key



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Initial OPOC Proposal	Summary of WG topics considered
<p>records associated with the domain name within a DNS nameserver. The OPOC may also resolve additional types of issues based on agreement with the registered name holder to do so.</p>	<p>requirements (3.2). No agreement that OPOC should perform this role. Concerns include whether “reveal” contravenes national law, cost and scalability for registrars, potential delays for requesters, and the need to define conditions under which reveal should be an option (e.g. reasonable likelihood of harm? Inaccurate WHOIS data? Failure to relay as a pre-condition?).</p> <ul style="list-style-type: none"> to provide a remedy in narrow case when registrant consents. WG agreed --out of scope (3.3) <p>OPOC characteristics and requirements: The WG agreed there may be up to two OPOCs; an OPOC may be a Registrant, Registrar or third party appointed by the Registrant; all Registrants must appoint an OPOC (2.1, 2.2)</p> <p>Verification: The WG agreed that accrediting of OPOCs is neither scalable nor practicable. There was support (but not agreement) that verification of an OPOC’s active email address must be obtained before enabling a website to resolve. Failure to obtain verification in a given time period must result in a failure to register (2.3). Alternative views opposing verification include registrar concerns about cost and delay and potential burden to users.</p> <p>Consent: The WG agreed that the Registrant must name a functional OPOC and that a process to establish the relationship between the OPOC and Registrant is required (2.4). Alternative views differ about when and how consent might be obtained, and raise concerns about costs and burden of an explicit consent requirement on Registrants and Registrars. Other concerns include timing, and whether consent should be required before registration is completed.</p> <p>Proxy services: The WG agreed that proxy services are irrelevant to the existence of an OPOC, and that when a proxy service is used, the proxy and the first designated OPOC must be the same (2.5).</p> <p>OPOC and tech/admin contacts: The WG agreed a technical contact would continue to be displayed only when registrant contact data is displayed, and there is no need to display admin contact if OPOC is implemented (2.6).</p> <p>What happens if OPOC responsibilities are not fulfilled: The WG agreed if an OPOC fails to respond to relay or reveal within a set time, the requester may contact the Registrar to reveal the registrant’s WHOIS data, to suspend the domain name record or web-site DNS, and to lock the domain from transfer for a set</p>



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Initial OPOC Proposal	Summary of WG topics considered
	<p>period (Sec. 4). There was support for the view that this service should be free to requesters. Alternative views questioned whether registrars should reveal data without due process, whether web site suspension is out of scope, how costs should be recovered and sanctions for OPOCs who repeatedly fail to perform.</p> <p>Examining how legitimate interests will access unpublished registration data (Sec. 6)</p> <p>Typically, requesters of unpublished data about natural persons would contact the OPOC. The WG also considered the circumstances in which a requester might access unpublished data directly from a Registrar. The WG considered four types of access:</p> <p>(6.1) Access to displayed WHOIS records – Agreed that public access to full records for legal persons would continue but only limited data would be displayed for natural persons</p> <p>(6.2) One-time access to a specified un-displayed data record – see below</p> <p>(6.3) Regular query-based access to un-displayed records – see below</p> <p>(6.4) Full access to displayed and un-displayed records – see below</p> <p>The WG agreed that there were circumstances where law enforcement might need each type of access (6.2, 6.3, 6.4) and where private actors might need 6.2 and 6.3 access. Various alternative views urged narrowing or broadening of access, two alternative views opposed the recommendation.</p> <p>Authentication (6.6): The WG knew of no globally scalable means of authentication and agreed the feasibility, practicality and cost-effectiveness of authentication mechanisms should be studied. The WG agreed OPOC implementation should be contingent on a broadly supported means of access. There was support (but not agreement) that self-declaration is sufficient in the absence of more reliable means. An alternative view objected to self-declaration, others disagreed with the recommendations.</p> <p>Charging for access services (6.7) Agreement that a fee may be charged.</p> <p>Whether publication of registrants’ contact information should be based on the type of registrant (legal vs. natural persons) or the registrant’s use of a domain name (Sec. 5)</p> <p>The WG agreed the OPOC proposal should change WHOIS policy to distinguish between natural persons (real, living individuals) where only limited data is</p>



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Initial OPOC Proposal	Summary of WG topics considered
	<p>displayed, and legal persons (business, partnership, non-profit) where data would be fully displayed. The WG agreed that a distinction based on use was neither timely at registration nor easily operational (5.2).</p>
<p>Contact data published by Registrars via WHOIS: Registrars would display full contact information for the OPOC (name, address, telephone number and email address) but only the registrant's name and country/jurisdiction. Registrars would also publish the initial domain name registration date, expiry date and certain registry level data (see attachment 1). Registrars may choose to publish additional data at their discretion.</p>	<p>WG discussions regarding OPOC and Registrars Potential impacts are described throughout the report, two directly related to data display are highlighted below: RAA: There will need to be a change to both the Registrar Accreditation Agreement (RAA) and subsequently Registrar-Registrant agreements to reflect a new OPOC relationship. Regarding the OPOC and the tech/admin contacts: The WG report suggests that consideration be given to reconciling the different display obligations between registrars and registries (2.6).</p>
<p>Contact data published by Registries via WHOIS: Registries will only publish data as follows:</p> <ul style="list-style-type: none"> • Registered name • Identity of Sponsoring Registrar including: <ul style="list-style-type: none"> ○ the Registrar Name and; ○ corresponding IANA Registrar Identification Number • The URI of the authoritative WHOIS server • All authoritative nameserver hostnames and corresponding IP addresses • Status of Registered Name and any other EPP RFC Registry value) • Initial registration date and expiry date 	<p>WG discussions regarding OPOC and Registries Potential impacts are described throughout the report, three related to data display are highlighted below: Should all registries become thin registries? There may be differences among registries in the information displayed based on national laws and whether the registry is sponsored or generic. A sponsor may not want to be a thin registry. There may be benefits to the thick registry model. Registry agreements: Changes will be needed to the public WHOIS provisions in the gTLD registry agreements. Regarding the OPOC and the tech/admin contacts: The WG report suggests that consideration be given to reconciling the different display obligations between registrars and registries (2.6).</p>
<p>Mechanism to deal with inaccurate data: Registrars must continue to update registration records when a registrant provides updated information and positively respond to notices of alleged inaccuracies in a timely manner. Specifically, when a Registrar is notified of an alleged inaccuracy in a WHOIS record;</p> <ol style="list-style-type: none"> 1. the Registrar must notify the OPOC or registrant in a timely manner. 2. The OPOC or registrant must correct the alleged inaccuracy or defend the accuracy of the data, also in a timely manner. 	<p>Regarding inaccurate data: Working Group discussion focused on this issue in Section 3 (role of OPOC to relay and/or reveal when a requester asserts that data is inaccurate), Section 4 (failure of OPOC to perform) and Section 6 (direct access to data from Registrars).</p>



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Initial OPOC Proposal	Summary of WG topics considered
<p>3. If the OPOC or registrant does not correct information within this time period, the Registrar must either "hold" the domain name or revoke the registration.</p> <p>4. Before accepting new information, the Registrar must verify that the OPOC or registrant can be contacted using the new email address provided.</p> <p>5. If the basis for the original complaint included data elements other than e-mail address, the Registrar must take reasonable steps to validate corrections to these data elements before accepting.</p> <p>A standardized mechanism should be used to convey notices of alleged inaccuracy from the internet community and distribute them to the relevant registrar.</p>	
<p>Contact information and domain name transfers:</p> <p>Registrars must continue to transfer detailed contact records at the request of the registrant or OPOC. Thus a Sponsoring Registrar must make the data outlined in RAA section 3.3.1 available to a prospective gaining registrar upon request for the purpose of confirming Registrant/OPOC identity and authenticating the transfer request. This mechanism should be augmented by using EPP AUTH-INFO tokens/codes where appropriate. The Inter-registrar Transfer policy should be amended to recognize the OPOC and sunset of the Administrative, Technical and Billing Contacts.</p>	<p>Topic was not addressed further in WG Report.</p>

VI. Constituency Statements

Statement of the Commercial and Business Users Constituency, regarding WHOIS, October-2007

On 6 September 2007, the GNSO Council approved a motion requesting constituency statements regarding reports by the [WHOIS Task Force](#), [WHOIS Working Group](#), and [Staff Overview](#). Statements were requested by October 4, 2007.

In response, the Commercial and Business Users Constituency (BC) submits a two-part statement.

First, the BC re-submits its statement of concerns with the Operational Point of Contact (OPOC) proposal, as published in the [Final Task Force Report on Whois Services, 16 March 2007](#) (see excerpt below). The BC is resubmitting its previous position because the concerns raised earlier this year remain relevant to the current WHOIS discussion. Moreover, BC membership believes that most questions raised regarding



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OPOC were not sufficiently resolved within the WHOIS Working Group, notwithstanding the remarkable efforts invested by Working Group participants.

Second, the BC has adopted the following position regarding the [Final Outcomes Report of the WHOIS Working Group 2007](#) :

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 believes that any changes to Whois Services should not be considered until the completion of four studies recommended in Section 8 of the *Working Group Final Outcomes Report* (Section 8 shown below, from <http://gnso.icann.org/drafts/icann-whois-wg-report-final-1-9.pdf>)

Moreover, the BC believes the recommended studies should be conducted in three phases. The benefit of a phased approach is to reduce demands on ICANN resources in the event that early studies show that subsequent studies could be eliminated or more tightly targeted.

We propose phasing these studies as described below:

Phase One Studies

In the first phase, 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.

This study is consistent with a study proposed earlier by the GAC. It should go beyond the June 2007 ICANN SSAC study on spam in order to document all specific misuses of WHOIS data.

In addition, the BC recommends that this first phase include a review and analysis of proxy services presently available. That should include an analysis of the extent and characteristics of users who avail themselves of proxy services, and an evaluation of how proxy vendors are responding to requests to relay communications and reveal information about registrants. Expert resources should be used for the development of the study.

Study results from this initial phase should be published for review and consideration by Council and the ICANN community.

Phase Two Studies

A second phase of studies would be needed if the first phase reveals that there is significant misuse of WHOIS data. In the second phase, ICANN staff would proceed with the cost-related studies recommended in the *Working Group Final Outcomes Report*.

- costs to implement the verification and consent proposals described in sections 2.4 and 2.5;
- costs to implement the Request/compliance issues of section 4;
- costs to implement the Access options described in section 6;

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- marginal costs to implement a new fee-based system for Accessors compared with recovering additional costs from user fees using existing systems;

Study results from this second phase should be published for review and consideration by Council and the ICANN community.

Phase Three Studies

If the phase two cost studies reveal costs that are justified in order to remedy the documented misuse of WHOIS data, ICANN staff should proceed with a third phase of studies. This third phase should combine the two remaining studies recommended in the *Working Group Final Outcomes Report*:

- data privacy issues arising from the self-declaration of Accessors in the Access proposal described in section 6 of the *Working Group Final Outcomes Report*. This should include an analysis of ex-post review mechanisms;
- mechanisms for a practicable, cost-effective, globally scaleable means of authenticating Accessors as described in section 6. This should include authentication of any parties with a legitimate interest in the data

Study results from the third phase would inform implementation planning for any mechanisms to restrict access to WHOIS data.



Appendix A

Excerpt from [Final Outcomes Report of the WHOIS Working Group 2007](#)

SECTION 8 – FEASIBILITY STUDIES

Throughout the group's time there have been a number of issues that were unresolved as a result of technical or legal uncertainty. Such issues lend themselves to short, focused studies to assess feasibility and certainty. The group would welcome specific ideas from ICANN staff around the headline issues below. The group would like to see all studies completed before the start of the second quarter 2008.

These issues include:

1. cost-related studies:
 - costs to implement the verification and consent proposals described in sections 2.4 and 2.5;
 - costs to implement the Request/compliance issues of section 4;
 - costs to implement the Access options described in section 6;
 - marginal costs to implement a new fee-based system for Accessors compared with recovering additional costs from user fees using existing systems;
2. data privacy issues arising from the self-declaration of Accessors in the Access proposal described in section 6;
3. mechanisms for a practicable, cost-effective, globally scaleable means of authenticating Accessors as described in section 6.
4. information on gTLD registrants and registrations and the use and misuse of WHOIS data. (This would be a broadening of a study proposed by the GAC and a go beyond the focus on spam in the June 2007 ICANN SSAC study.)



Appendix B

Statement of the Commercial and Business Users Constituency, regarding the Jan-2007 Final Report of the Whois Task Force

From the [*Final Task Force Report on Whois Services, 16 March 2007*](#)

I. Improvements to the Final Report of the Task Force

Recommendations to Improve the TF Final Report:

A. A brief summary of the various processes and events undertaken by the TF, including participation in workshops, outreach via conference calls to external parties, etc. should be added to the Background section, under a suitable heading describing the work processes of the TF.

B. Full wording of the GNSO Council resolutions should be added as appendices and links to the resolutions be inserted into the Background section of the Final Task Force Report. This will provide a fuller record when the Final report is considered by the GNSO Council, and eventually, the ICANN Board. The relevant resolutions are 20060720-02 and 20060720-03 and can be found at www.gnso.icann.org/resolutions.

II. BC Comments specific to the Preliminary Task Force Report

The BC comments in general support Special Circumstances Proposal over OPOC, provide input and recommendations to improve the two proposals under consideration by the TF; propose additional steps, in lieu of either proposal, that will improve the WHOIS service, curtailing harvesting of emails and telephone numbers from publicly displayed WHOIS data, and limiting any marketing uses of WHOIS data. The BC also recommends a study by an independent third party of the characteristics of gTLD registrants in non sponsored gTLDs, as well as the uses and perceived misuses of WHOIS data.

A. Comments of the BC related to the OPOC Proposal

The BC highlights the following concerns and questions related to the OPOC proposal:

As presently drafted, the OPOC Proposal does not provide a clear definition of the roles and responsibilities of an OPOC. The only statement in the proposal related to the obligations of the OPOC is: "The purpose of the operational point of contact is to resolve, or to reliably pass on data to resolve, operational issues relating to a domain name. At a minimum, this must include the resolution of issues relating to the configuration of the records associated with the domain name within the DNS server."^[7] Any other obligations are optional between the OPOC and the registered name holder.

Recommendation: An agreed set of responsibilities should be included, and published as part of the registrant agreement, which should be reviewed and accepted as part of the registration process.

The OPOC eliminates the postal address of the registered name holder, but does not provide certainty of how such registered name holder will be contacted by the OPOC, in the event of problems, legal issues, etc.

The BC opposes the elimination of the postal address of the registered name holder. Registered name holders are ultimately the parties responsible for registering a name, and any misuse, or use related to the name registration.

If there is a change that creates a new designation such as 'OPOC', there should be a range of options to the registered name holder in how that function is fulfilled including self provision of these functions.

The tasks and purposes of the OPOC must therefore be defined, and at a minimum must include:

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Agreement to provide accurate and complete contact details for a 24/7 contactability, and to maintain published and accurate data

Agreement to accept all kinds of contacts, ranging from technical, administrative, IP conflict, legal notices, contact from law enforcement, on behalf of the registered name holder

The ability to address and resolve technical or operational issues or problems.

Responsibility for forwarding, within an appropriate timeframe*, correspondence and requests to contact the registrant and/or the technical resource for the registrant.

*The TF has discussed but not resolved what an appropriate time frame may be. Some issues that are encountered are urgent, such as network attacks, phishing, pharming incidents, etc.

Recommendation: The BC recommends that the 'defined purpose and functional tasks to be performed by the OPOC' should be established by consensus policy. This should include a requirement that Registrars ensure that registrants read and accept or delegate to an identified third party or to the registrar, if acting as the OPOC, the responsibilities of the OPOC, at the time of registration/renewal.

As presently drafted, the OPOC proposal does not provide a standardized mechanism for access to non-public contact data for legitimate stakeholders, upon the implementation of an OPOC by a registered name holder.

The proponents of the OPOC proposal acknowledged this deficiency during the Public Forum at the ICANN meeting in Sao Paulo.

Recommendation: Any proposal to modify the existing WHOIS policy related to data displayed and access to data must include a process for access to non displayed data before changes in the existing practices are introduced.

The BC welcomes hearing from proponents of OPOC regarding recommendations for how to address access to non displayed data.

One approach that could merit study is the recognition that there are hundreds of accredited registrars, and that any approach needs to take into account the burden on legitimate users of WHOIS. It may be appropriate to examine the creation of a "white list" for legitimate stakeholders who need access to deal with "legitimate" purposes, such as network attacks; phishing; pharming attacks; trademark collisions, etc. This 'white list' should be developed and maintained by ICANN, based on criteria that are broadly agreed upon, and published for public comment. The cost to become 'accredited' should be borne by the applicant. ICANN should publish the 'white list' on the ICANN web site. Accredited ICANN Registrars /registries should be required to recognize the status of those on the 'white list'. A form of unique standard identification and sanctions by ICANN will be needed to prevent abuse of this status.

At present, the OPOC proposal does not address accuracy improvement. If OPOC were to be adopted and thus even less data were to be made publicly available the accuracy of the OPOC's contact data becomes even more important.

Recommendation: The OPOC proposal should be elaborated to include a pre validation of the completeness and accuracy of contact details of the OPOC at the time of registration. The RAA should also provide for periodic checking of the OPOC details and a standardized notice to the registrant, to remind them to verify the accuracy of their OPOC details, and of consequences of providing inaccurate, or failing to correct such data, such as suspension/loss of registered name.

The issue of a 'system-wide' change of this nature, encompassing tens of millions of records for registered names needs to be examined for its implications. In addition, if such a change is envisioned, the TF should schedule a further discussion with relevant parties related to the role and implications of



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IRIS/CRISP and whether there is a consideration of a longer term evolution to a new protocol for WHOIS. A detailed discussion with ICANN Operational staff is needed to examine implementation issues.

Conclusion: The BC does not support the OPOC Proposal as presently drafted, and remain doubtful that these issues will be satisfactorily resolved.

B. THE SPECIAL CIRCUMSTANCES PROPOSAL (SCP)

Although the Special Circumstances Proposal has areas of improvement needed, and the BC suggests that other mechanisms, such as are described in IV, are in need of further examination by the TF, in general the BC supports the Special Circumstances objectives.

The Special Circumstances Proposal (SCP) addresses a specific need that has been identified by a number of ICANN stakeholders, and that the BC recognizes: that there are a limited number of registrants who are indeed acting purely as individuals in their use of a domain name, or who have a legitimate need for a private registration due to the nature of the services that they provide, such as a service for abused spouses or children.

The SCP assumes that for the most part, those who register domain names are holding themselves out to communicate with the public, and that, given proper notice and choice of whether they use a domain name registered from an ICANN accredited registrar and build and maintain a unique web site, versus utilizing a web hosting service that can provide similar functions, hosting of information, etc. the registrant can make an informed choice of how to proceed.

In the registration and use of domain names, the BC believes that the public at large has a right to know with whom they are interacting and communicating.

The BC recognizes that there are instances where a registrant has a legitimate need for a private registration. While the BC believes that such registrations are limited, and should be validated, the BC can support the development of a model similar to that of the 'unlisted numbers' used in certain national telecommunications jurisdictions, including the US and certain countries in Europe.

Therefore BC supports the concept of establishing a process whereby an individual, or appropriate non commercial service entity can apply for an opt-out for the inclusion of their contact data in a publicly accessible WHOIS if their safety and security cannot be protected otherwise, as provided by the Special Circumstances Proposal.

The BC can support the Special Circumstances Proposal in principle, but has identified some improvements and questions yet to be addressed.

B. 5. Improvements and enhancements that the BC would like to see elaborated on for the SCP are:

Purpose of the registered Name Holder: The BC notes that the present SCP does not provide a definition.

Purpose of the Technical Contact and Administrative Contact.

Recommendation: The BC supports the definitions from Exhibit C of the Transfers Task Force and suggests that they be incorporated in the SCP.

Access to Data: Since the majority of registered names will have all data displayed, there is less demand for new procedures for access to non displayed data. The BC proposes other changes in how data is displayed, in Section IV.

However in the SCP area, for the registration contact data not displayed due to approval for SCP the BC suggests that there needs to be an improved procedure for access to data not displayed. The BC would like to see this area elaborated.

The SCP does not provide discussion of steps needed to improve accuracy of registrant, technical, and administrative contact data in registration and renewal of domain names.



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Recommendation: The SCP should be elaborated to include a pre validation of all contact details at the time of registration for any party determined to be eligible for SC. The third party who holds the data should be required to provide accurate data for themselves and to attest that they have verified and maintain accurate contact data for the registrant. The RAA should also provide for periodic checking of the SC registrant data and procedures to require updates, or corrections.

The BC agrees that the proposal needs to be examined for scalability to the gTLD non sponsored space. In general, the BC supports the concepts provided in the SCP to rely upon outsourcing of the special circumstances application process to independent third-party vendor(s), possibly on a regionalized basis, ensuring adequate funding and outlining a simple and clear process for the application, designation and appeal of "special circumstances" request(s). This will require support from the ICANN operational staff, and should be explored, keeping in mind the lessons learned from the .nl service.

III. Additional Recommendations on other steps the Task Force should consider:

Neither the special circumstances proposal nor the OPOC proposals address concerns related to the mining of WHOIS data for marketing purposes, a use that the BC has consistently opposed. The BC therefore endorses steps that can assist in limiting misuses or abuses of publicly accessible WHOIS data.

The steps recommended by the BC are supplemental to, but consistent with the concerns and issues now being addressed by the TF; for instance, the recommendation to rely only on web based display of WHOIS data, with adequate IVC addresses the TOR's question about access to data; since the majority of registrant data would still be displayed, but with limits on any other uses of the data, e.g. for marketing.

Recommendation A. Study related to Facts about gTLD Registrants; Uses of Domain Names, Misuses of WHOIS Data; Uses and Users of WHOIS Data

It is time for a comprehensive study which should address the characteristics of registrants and of users of WHOIS data in the non sponsored gTLD registry space. This study should be undertaken by a neutral third party, retained and funded by ICANN, and study such issues as the characteristics of registrants; whether a domain name is actually in use [live DNS], uses and misuses/abuses of WHOIS data. Comments related to the development of the elements and scope of the study should be sought from the GNSO's Constituencies, the Advisory Committees, including At Large and GAC, and the SSAC.

The BC calls for a study of non sponsored gTLDs and WHOIS, to encompass at least the following issues and questions:

Characteristics of registrants in the non sponsored/open gTLDS,

e.g.: numbers of registrants who: 1) use the domain name for personal use; 2)for 'speculation/holding/resale; 3)for traffic aggregation; 4)for non commerce; and 5)for commerce online and 6) governmental or related purpose 7) other [to be identified]

Identify the percentage/number of sites that are registered, but do not have 'live DNS' versus those that are actually in use

Uses, misuses and abuses of WHOIS data, as publicly displayed

Identify the percentage of inaccurate data, and undertake a sample examination of why data is inaccurate – e.g. a) aged data; b) typo/registrant error c) purposeful provision of inaccurate data d) other [to be identified]

Recommendation B. Steps to eliminate 'data mining'

Over the history of GNSO work on WHOIS, concerns have been raised about 'data mining' of publicly available WHOIS data; and misuses of port 43 and bulk access to WHOIS data. Steps have been taken in the past to attempt to curtail marketing uses of bulk access data. However, the BC recommends further changes that can curtail, if not eliminate data mining and harvesting of email and telephone numbers and



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limit any misuses of bulk access data. In addition, the BC proposes strict limits to how bulk access and Port 43 access to WHOIS data is granted, and the creation of a 'white list' of authorized uses, and users.

All WHOIS access should be changed in all WHOIS publicly available services to web based access. Such web based services should include an Image Verification Check (IVC) of sufficient security strength so that the random letters generated are not easily machine readable.

All bulk access should be moved to ICANN developed contractual terms for access, with an accreditation process for parties allowed to have such contracts. ICANN should develop standard terms and conditions and enforcement them when they are violated. These standard terms and conditions should be applied to all gTLDs; and a standardized range of cost recovery fees can be established. In general, parties who need bulk access for legitimate purposes are trademark and other firms that provide trademark defense or portfolio management services, or services utilized by law enforcement authorities.

This approach does need further exploration with law enforcement and consumer protection authorities to ensure how best to address their need for port 43 access or bulk access.

Summary:

In summary, the BC does not believe that the recommendations presented by the WHOIS Task Force are yet complete, nor do they represent full consideration of the full range of issues and implications with system wide changes, nor do they address balanced consideration of the full range of public policy implications.

The Task Force has not yet given sufficient consideration to options for addressing changes in the display of data, nor in how to deal with the non display of data, if changes are made in the public display of data elements.

In the OPOC, the issues of a system wide change that will implicated tens of millions of registrations has to be considered, and examined for how it might cause registrant confusion or even add extreme burdens of customer complaints during an implementation. Discussions of phased implementation, with changes occurring at the time of renewal have to be undertaken, while recognition of multiple year registrations and the need for co-existence of dual systems has not been a topic of discussion.

In the SCP, there is a need for further examination of how to implement the recommendation, including the development of criteria for the 'special circumstances' status. However, in this instance, some historical success of country codes who have undertaken similar approaches can be studied and drawn upon.

The BC again notes that in general, they can support the Special circumstances over the OPOC proposal.

The BC's additional recommendations should be explored and implemented as first steps to limit some of the areas of concern that are often expressed by parties who object to public display of data because of abuse of bulk access, or data mining.

IV. Process followed:

According to the ICANN bylaws (Annex A, paragraph 7.d.1) the Task Force Reports must include constituency statements. The BC has provided earlier Constituency Statements related to the "Purpose of WHOIS and of the WHOIS Contacts". The earlier constituency statement was requested before the level of detailed recommendations presented in this Preliminary Report. The BC's comments are provided in detail in the previous sections.

Relevant section from ICANN bylaws: Annex A, Paragraph 7.d.

1. Constituency Statements:

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(i) if a Supermajority Vote was reached, a clear statement of the constituency's position on the issue - the constituency's position is detailed in the submission.

(ii) if a Supermajority Vote was not reached, a clear statement of all positions espoused by constituency members: Non applicable.

(iii) a clear statement of how the constituency arrived at its position(s)

The BC has three representatives to the WHOIS Task Force: Marilyn Cade, David Fares, and Sarah Deutsch. Throughout the work of the Task Force, the representatives have maintained interaction with the membership, including postings and briefings by BC TF members on the work of the WHOIS Task Force. BC members are generally quite concerned and interested in WHOIS, and are actively engaged in this topic, when it is raised within the BC, or is the subject of ICANN public forums/workshops.

As an example, members were briefed on both of the proposals; and discussions took place in the face to face ICANN meetings, as well as on the BC list.

The BC Rapporteur and fellow Task Force members forwarded the draft Constituency comments to the BC list on December 28. BC members had 14 days to provide comments and edits to the Comments, and were specifically asked to show their support to the report, and to identify any areas of disagreement. The BC TF members edited the Comments, and prepared this final submission, taking into account all responses received, and discussions that have taken place on the BC list and face to face meetings and workshops.

(iv) Analysis of how the issue would affect the constituency; including any financial impact on the constituency

The BC's interests are harmed by the lack of accurate WHOIS data and will be harmed by lack of access to WHOIS data, if public access to WHOIS data is changed, and if there is no suitable substitutes to ensure that legitimate users have timely access to accurate WHOIS contact data, so that they can deal with network attacks, trademark infringements; phishing and pharming attacks, as well as undertake normal use of the WHOIS database related to checking for availability of registerable names for use in setting up new web sites.

The BC expects the impact of the OPOC proposal and the Special Circumstances Proposal to have significant financial and resource impact on registrants, including business users during the time to incorporate a system wide change. As users of WHOIS data to address problems, the BC anticipates significant resource demands as new procedures are developed, disseminated, and incorporated widely.

The OPOC proposal is anticipated to have an ongoing negative financial impact to users of WHOIS data, who rely on access to WHOIS data to quickly identify and contact the party responsible for cyber squatting, phishing, pharming, network attacks, and trademark infringements.

A move to web based access coupled with improved contractual terms for bulk access will represent the least invasive change to users, but will curtail data mining in displayed data. Thus, this change, as recommended by the Business Constituency, provides improvements to WHOIS but without the associated harms to the interests of the Business Constituency's members.

(v) An analysis of the period of time that would likely be necessary to implement the policy(ies):

The time frames to implement any of these changes is significant. If improved and adopted, the OPOC proposal would take extensive time to finalize and implement, since it is dependent upon changes in operation that affect all registrants of domain names. An implementation team should include broad representation from ISP/Connectivity providers, business users and At Large, since it is registrants who will have to first understand and undertake the changes needed to identify an OPOC, and then incorporate this change in their registration process. In the past, implementation teams have been dominated by registrars and/or registries. In this situation, it is imperative that full attention be given to the



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challenges that registrants will face as they are asked to incorporate possible changes in their operation in order to identify an 'OPOC'; establish such a role internally, or reform how they manage their domain name portfolio to take into account 'outsourcing' of these functions now managed internally.

While the impact on small companies who typically rely upon their ISP or registrar already for such services may be minimal, larger more distributed corporations may take more time to assimilate a change in functional assignment of responsibilities typically managed internally.

Implementing changes involving several tens of millions of registrations as required if OPOC moves forward, is a major change and one not yet achieved in the history of an ICANN with the number of registered domain names under management in the non sponsored gTLDs.

The BC notes that the TF has not discussed the scope and scale of such changes, nor the details related to educating and creating awareness among registrants, although the topic has been raised in the TF. Therefore, until such discussion takes place, the BC cannot estimate the length of time, but does call for an examination of how the registrant population will be educated about changes, both in OPOC, and in SCP.

The SCP is more limited in the number of registrations affected, since it is limited to those registrations determined to have a need for privacy. The time challenges for SCP will be related to the creation of a process to determine who should be eligible; and identifying and retaining an entity(ies) that can accept applications. The BC acknowledges that the SCP process can be modeled upon the .nl model, but the issues of scalability need to be addressed.

ICANN staff resources are implicated for both proposals, and a discussion of the feasibility and implementation details are needed for both proposals. These should be scheduled and completed during the public comment period so that the TF can take this consideration into account as part of the preparation of the Final Report.

The BC's recommendations related to a study and to other changes also deserve further consideration in terms of time to implement. Just like the OPOC and Special Circumstances Proposal, the change to web based access would require work by an implementation team that should include representatives from all constituencies and the operational staff. And, similarly to the other two proposals, an outreach and awareness 'campaign' by ICANN that announces substantive changes to WHOIS access would be needed.

Once ICANN agrees to fund a study, the terms of reference for a study can be defined, and posted for public comment. It is conceivable that with commitment to undertaking the study, and with assigned staff working with the relevant expert parties to solicit input and feedback, a well documented and statistically valid survey instrument; coupled with a series of data interviews of representative users, registrants, registrars, etc., can be developed within a matter of a few weeks. The study will probably require both public data gathering, and solicitation of subjective data, describing misuses or abuses of WHOIS data, and also misuses and abuses of domain names, where WHOIS data has been used to address and provide investigatory resources to curtail or end abuses.

The design, preparation, and conducting of such a study should become a priority in order to guide and inform policy making. Once agreed, the study could even proceed in stages, with interviews and statistically oriented questionnaires proceeding simultaneously. The study could be developed and implemented in parallel to the rest of the work on WHOIS needed at the GNSO Council, in its further outreach and consultation with the advisory committees.

Submitted on behalf of the Business Constituency WHOIS Task Force members:

Marilyn Cade, Sarah Deutsch, David Fares

15 Jan 2007



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Individual NomCom appointee to council's statement regarding the Whois Report:

The OPOC proposal in its very definition was a compromise position between those who believe that registrant privacy is paramount and those who believe that public access to personal data on registrants is necessary in order for them to protect either the public or their clients. Certainly the publication of an individual registrant's name, and place of residence, even if without specific street details, was a large compromise from a privacy perspective. But it was a compromise that made it possible for law enforcement to apply due process as seems necessary.

I believe that two of the proposed mechanisms listed in the Whois report violate that compromise on the balance between privacy and the ability of established law enforcement to access the information necessary for due process of law.

I believe that part of this compromise was lost in the Whois WG's definitions of the REVEAL function in 3.2 of the Whois WG Final Report. This function allows for a person's private data to be released almost at the whim of a complainant. It does not require any sort of legal decision on the actionable harm, but allows the mere accusation of such harm as an adequate cause for the release of data. In my opinion this violates the essential human privacy rights of natural persons.

Likewise the Access function, while arguably sometimes necessary to established law enforcement, has been defined much too broadly. Access as defined in Section 6 should only be available as defined in 6.2, i.e. on a one time basis to properly authenticated Law Enforcement Agencies. It is an important principle in privacy that a person's private information only be accessible when there is a specific complaint that can be upheld by due process. It is also an important principle that such access only be available to those who are properly authorised by their respective governments as agencies of law enforcement.

I believe that a lot of the work done by the Whois WG is helpful in the definition of the OPOC function. I fear, however, that the excess of the Reveal and Access mechanisms put the entire fabric of the compromise at risk and may cause disintegration of an ICANN consensus on Whois. I further believe that taking all of the comments into account would result in an implementation that did not include a Reveal function and would restrict Access to authenticated law enforcement of the basis of a single case at a time. I support the motion to ask the ICANN staff to propose an implementation of the OPOC that establishes the essential social compromise between the requirements of privacy and the need to facilitate lawful exercise of due process as was contained in the original Task Force recommendation on Whois. Absent supermajority support to create an implementation that establishes such a proper balance, I support "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 by the AGM of 2008.

IPC Constituency Statement (10/4/07)

Pursuant to item 2 of the GNSO Council resolution of September 6, 2007, the Intellectual Property Interests Constituency (IPC) provides the following update of its previous (January 2007) constituency statement on Whois. See <http://gns0.icann.org/issues/whois-privacy/whois-services-final-tf-report-12mar07.htm#IPC>.

Items (i) through (iii): The issue was discussed when the constituency met by teleconference on September 5, 2007. A draft statement was circulated to all IPC members. The statement below reflects changes suggested by IPC members.

Item (iv)

Re: Motion #1



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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.

Accordingly, IPC opposes Motion #1, which "supports the OPOC recommendation as contained in the Task Force report."

Motion #2

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

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



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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.

Item (v)

IPC has no idea how long it would take to implement Motion #1.

By its terms, the first step of Motion #2 (presentation of draft RFP, budget and timeline and methodology for outreach) would be implemented within 90 days. Full implementation (completion of the study) could probably be achieved within a 12-18 month period.

By its terms, Motion #3 would be fully implemented by the end of the 2008 ICANN Annual General Meeting.

CONSTITUENCY STATEMENT, NONCOMMERCIAL USERS

REPORT TO THE GNSO COUNCIL 25 September 2007

On Friday, September 14, the GNSO Staff report was circulated to the NCUC list. The same day, the NCUC Chair noted language in the report calling for "Constituency Statements" to be "submitted in a formal statement to the Council list and to the ICANN Policy Lead" within twenty one (21) calendar days after initiation of the PDP."

The Chair recommended that NCUC express its support for Motion #3 contained in the report (appended below). That motion recognizes the fact that there is no consensus on existing Whois policy and asks that the Whois portions of the Registrar Accreditation Agreement be "sunsetting" (i.e., expired) at the end of 2008, and that support for Motion #1 be withdrawn.

On Sunday, September 16 NCUC's monthly conference call was held to discuss the Chair's recommendation and find out whether there is any support for the recommendation. Finding no opposition on that call, it was agreed to send out an open ballot on the list asking whether all members agreed or disagreed with the recommendation. That ballot was sent September 16. By Thursday, September 20 the following results were obtained:

Mueller	AGREE (NA)
Guerra	AGREE (NA)
Greve	AGREE (EU)
Gross	AGREE (NA)
Kleiman	AGREE (NA)
Krimm	AGREE (NA)
Klein	AGREE (AP)
Nzepa	AGREE (AF)
Peake	AGREE (AP)
Kissoondoyal	AGREE (AF)



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Banks	AGREE (EU)
Afonso	AGREE (LAC)
Preston	AGREE (NA)
Rahman	AGREE (AP)
Tan	AGREE (AP)
Fernandes	AGREE (LAC)
Chango	AGREE (AF)
Chun	AGREE (AP)

Younger	DISAGREE (NA)
Levins	DISAGREE (AF)

NCUC Tally 18-2

It is clear that within NCUC support is overwhelming for Motion 3, which would sunset current Whois requirements until a new policy can be negotiated from a clean slate. In discussions, several concerns were expressed about the "reveal" function in the Whois report. As one member stated, "the REVEAL section...has no relationship to any real-world scenario I know. In the real-world, a trademark owner sends a cease and desist letter to a person, or his attorney, and the parties can choose to respond, or not respond. The idea that anyone MUST respond to a demand that is inaccurate, overbroad, intimidating or threatening just because another individual or big business alleges there is an illegality (and they all always do) is not consistent with law." Another member, who participated in the Whois WG, added, "Once I realized what had transpired in sub-group A, where the reveal function was defined, I (and others) tried to object to it all along, as it seems like a total loophole to the access provisions we were trying to define and balance in sub-group B."

One member who disagreed with the motion expressed his view that "I personally prefer the current system to those proposed" and noted that under the current system registrars could sell or offer for free a service that shields the sensitive contact data. The other "disagree" voter preferred that NCUC take the lead in initiating new "face-to-face sessions on an intersessional basis wherein discussions may result in some type of an accord being reached." On this last point, the general sense of the constituency was best expressed by the member who wrote, "We don't need more meetings. We need a precedent for Whois that says that absent consensus (general agreement broadly across constituencies), ICANN contracts cannot be used to force registrants to give up fundamental rights..."

Impact on constituency: NCUC volunteers have invested an enormous amount of time in Whois policy proceedings. Further fruitless negotiations or machinations around Whois will be a waste of time and will have a damaging effect on ICANN's credibility among noncommercial organizations. Starting from a clean slate, as proposed in Motion #3, will revitalize interest in coming to a conclusion.

Clean-slate negotiations will also be the fastest way to a solution. The absence of a policy will provide everyone strong incentives to reach a conclusion. We estimate that a new solution could be agreed in six months.

Submitted on behalf of the NCUC by its Chair,

Milton Mueller, Professor
Syracuse University
The Convergence Center, School of Information Studies



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Motion #3

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.

Statement of the gTLD Registries Constituency on the final WHOIS Task Force Report of 12 March, 2007 (posted at <http://gns0.icann.org/issues/WHOIS-privacy/WHOIS-services-final-tf-report-12mar07.htm>) and the WHOIS Outcomes Working Group Report finalized on 20 August, 2007 and forwarded to the GNSO Council for consideration (posted at <http://gns0.icann.org/drafts/icann-WHOIS-wg-report-final-1-9.pdf>).

Introductory Statement

The following statement is provided by the gTLD Registries Constituency ("RyC") in response to the motion approved by the GNSO Council on 6 September, 2007 instructing the representatives of the constituencies to solicit comments regarding the issue under consideration.

The information is grouped as follows:

- I. General Information about the RyC
- II. Background Information about the development of the Comments
- III. Comments of the RyC
- IV. Method for Reaching Agreement on RyC Position
- V. Impact on Constituency



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VI. Time Period Necessary to Complete Implementation

I. General Information

Name of organization: GNSO gTLD Registries Constituency

Contact Person: David W. Maher, Chair

Contact email address: dmaher@pir.org

Number of official members of the organization: 15

Estimated number of potential eligible members of the organization: 16

Number of members that participated in developing this input: 11

II. Background Information about the development of the comments

The RyC comments included in this document were developed and adopted by constituency members via participation in the constituency's online mailing list and teleconference calls. All members and potential members of the constituency were encouraged to participate.

Drafts of the comments were distributed via the constituency email list, which is open to all members and potential members. Participants were then asked to propose possible edits and to communicate whether or not they agree with the comments and edits. In the end, only statements for which there was consensus support were included in this document.

III. Comments

The RyC previously filed comments with the GNSO on January 15, 2007 on the draft Preliminary Task Force Report on Whois Services³. The final WHOIS Task Force Report of 12 March, 2007 is posted at <http://gns0.icann.org/issues/whois-privacy/whois-services-final-tf-report-12mar07.htm>. As reported by the GNSO Secretariat, "Following completion of the Task Force Report and public comment period, on 28 March the GNSO Council issued a resolution creating a WHOIS Working Group to examine three issues and to make recommendations concerning how current policies may be improved to address these issues:

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 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

³ http://gns0.icann.org/issues/whois-privacy/prelim-tf-rpt-22nov06.htm#_Toc151981327



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before the GNSO Council, all recognizing the lack of consensus and varying widely in proposals for a way forward.

RyC believes that a decent respect for registrants' interests in protection of personal privacy demands a change in the type of data published in the WHOIS service. There is, of course, a difference between the types of data collected by registrars, and the types of data published in the WHOIS service. RyC generally supports the concepts underlying the Registrar Constituency's OPoC proposal (although there are some practical concerns addressed below). Registrars have their own business needs for collection of registrant data, and should be able to make decisions primarily based on these needs and on the legal requirements of the jurisdictions where they operate.

RyC strongly believes that there is no acceptable reason for publication of an individual's personal data such as home address, phone number or email address, whether by a registry or registrar unless that individual freely and explicitly gives consent to such publication. To the extent that such data is needed for law enforcement purposes or for the resolution of conflicts such as intellectual property, the appropriate means to meet these needs should be a tiered access process. RyC acknowledges that a tiered access model presents some policy implementation challenges but believes that it would be very worthwhile to confront those challenges in a constructive and diligent manner.

As stated above, RyC generally supports the underlying concepts of the OPoC proposal. There are, however, special needs of some registries that are not addressed by OPoC. Sponsored registries, including .aero, .cat, .coop, .jobs, .museum and .travel must be able to determine the eligibility of registration applicants. The OPoC proposal does not adequately deal with these needs, but this can be remedied without sacrifice of the general concept that the collection of data should be based primarily on business needs, local law, and the need to escrow data, while the publication of data should be consistent with protection of personal privacy and local law.

With respect to publication of data by registrars, RyC supports that portion of the current OPoC proposal, as follows:

Accredited registrars will publish three types of data:

- 1) Registered Name Holder*
- 2) Country and state/province of the registered name holder*
- 3) Contact information of the OPoC, including name, address, telephone number, email.*

Also published by the registrar:

- date of initial registration of the domain name (creation date)*
- expiry date,*
- registry level data as follows: registered name, sponsoring registrar, URI of the authoritative Whois server, authoritative names associated with the registration, and status of the registered name (e.g. lock, hold, expired).*

With respect to publication of data by the unsponsored registries, RyC also supports the OPoC position, as follows:

Registry data published is limited to:

- registered name*
- identity of sponsoring registrar (i.e. registrar name, registrar IANA identification number, URL of authoritative Whois server)*
- name server hostnames and corresponding IP addresses associated with the name*



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- *status of the registered name (e.g. lock, etc.)*
- *and – possibly – the creation and expiry dates of the name.*

RyC believes that the sponsored registries should be free to determine what data should be collected for their specific needs and also to determine whether any data, beyond that listed above should be published.

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.

IV. Method for Reaching Agreement on RyC Position

RyC drafted and circulated via email a constituency statement, soliciting input from its members. RyC members suggested edits and additions to the draft which were subsequently incorporated into the final constituency statement. The statement was adopted by affirmative vote of 11 of the 15 registries.

V. Impact on Constituency

Adoption of the positions advocated by RyC would assist the members of the RyC in fulfilling their legal obligations in their respective jurisdictions, and would be of significant benefit through lifting burdensome contractual requirements. The impact of WHOIS changes is larger for thick registries than it is for thin, and the impact on sponsored registries can be more significant than on unsponsored registries. Any major changes would likely have considerable impact on registries and especially on registrars, in time, money and resources.

VI. Time Period Necessary to Complete Implementation



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Completion of the OPoC proposal (or for that matter any tiered access proposal) to deal with policy and procedures to support access to non-published WHOIS data could involve considerable effort because questions must be answered prior to implementation such as the following: Who decides who gets access? How are requests for access authenticated? To whom should access be given? Who provides access? How would access be given?

In addition, implementing a tiered access system would probably involve all registries and registrars migrating from the current WHOIS protocol to the IRIS protocol, a process that would undoubtedly take considerable time.

RyC suggests that the time spent in addressing the above and finding a workable tiered access solution is a step in the right direction and such activity presents a far better investment of time and resources of the Internet community.