Draft motion – Rejection of the modification to procedure that implements the WHOIS conflicts with privacy law policy recommendation, because it is not consistent with the intent of the policy recommendation.

Proposal for a Policy Development Process (PDP) to revise the WHOIS conflicts with law policy, in order to better avoid the situation where registrars and registries are required by contract to violate data protection and privacy laws in the jurisdictions of their customers.

Whereas,

In November 2005, the Generic Names Supporting Organization (GNSO) concluded a policy development process (PDP) on WHOIS conflicts with privacy law, which recommended the creation of a procedure to address conflicts between a contracted party's WHOIS obligations and local/national privacy laws or regulations.

The ICANN Board of Directors adopted the recommendations in May 2006 and the final procedure was made effective in January 2008.

As noted in the GNSO Operating Procedures, “Periodic assessment of PDP recommendations and policies is an important tool to guard against unexpected results or inefficient processes arising from GNSO policies”. As called for in Step 6 of the [ICANN Procedure For Handling WHOIS Conflicts with Privacy Law](https://www.icann.org/resources/pages/whois-privacy-conflicts-procedure-2008-01-17-en), ICANN launched a review of the procedure in May 2014. Following a Call for Volunteers addressed to all interested parties, an Implementation Advisory Group (IAG) was formed to review the implementation of the policy recommendations and began its work in January 2015. The IAG devoted most of its time discussing whether additional triggers to invoke the procedure should be incorporated and if so how to ensure that they remain consistent with the existing policy.

On 26 May 2016, the IAG submitted its final report and recommendation to the GNSO Council.

The IAG recommends a modification to the existing Whois Conflicts Procedure. The modification would allow a party to trigger the procedure by obtaining a written statement from the government agency charged with enforcing its data privacy laws indicating that a particular Whois obligation conflicts with national law and then submitting that statement to ICANN.

Resolved,

The GNSO Council has reviewed the IAG Final Report (<http://gnso.icann.org/en/drafts/iag-review-whois-conflicts-procedure-23may16-en.pdf>) and concludes that the proposed modification to the procedure does not conform to the intent of the original policy recommendations and because of this, the GNSO Council rejects the report of the IAG. The GNSO confirms its objection to the modification being implemented by GDD Staff as outlined in Appendix I (<http://gnso.icann.org/en/drafts/iag-review-whois-conflicts-procedure-appendix-1-23may16-en.pdf>) and proposes that the WHOIS Conflicts with Law policy be reviewed and revised by a policy development procedure (PDP) as soon as possible.

The GNSO Council recognizes that the RDS PDP is working, through a phased workplan, on revision of RDS policies. However, it is unlikely that the WHOIS Conflicts with Law policy will be revised as a result of that process in a timely manner, given the volume of work. In the meantime, Registrars and Registries are faced, in the 116 countries with data protection laws in place, with considerable risk in attempting to implement this policy and seek waivers from its requirements. This was repeatedly pointed out by members of the working group, who were told that amendments to the policy were out of scope. Accordingly, it is the view of many members of the working group that a PDP must be struck to revise the policy.

The GNSO Council thanks the IAG for its work and regrets that it cannot accept the recommendations included in the Final Report. The GNSO Council requests that this motion be shared and discussed with the Next-Generation Registration Directory Services PDP Working Group as the policy development process envisioned in this motion is not intended to replace the work in the RDS group, but rather complement it.