Comments of the Non-Commercial Stakeholders Group on the Registration Directory Service (RDS-WHOIS2) Review Team Draft Initial Report

The Non-Commercial Stakeholders Group (NCSG) welcomes the opportunity to comment on the preliminary report of recommendations of the Registration Directory Service Review Team ('RDS II Review Team') published on 31 August 2018.[1] The NCSG is the most diverse body in the Generic Names Supporting Organization, with individual and organizational members from 128 countries. As a network of individual and organizational academics, Internet end-users, and civil society actors representing the interests of non-commercial registrants and users of the Domain Name System, we represent a broad cross-section of the global Internet community.

As a civil society constituency, we are concerned with the rights of non-commercial Internet users and matters concerning the policy development regarding gTLDs. The NCSG has always taken a vivid interest in policy issues surrounding WHOIS and registrant data services. In particular, we have championed the rights of registrants to privacy, under applicable law or as a general policy, and to free speech and the protection of those who engage in it over the Internet. In this respect, while we appreciate the detail provided in this rather lengthy report, we do not believe the Review Team (RT) has gone far enough in this report to focus on the rights and expectations of registrants to data protection. Though we certainly appreciate the difficult position in which the Review Team was operating, we believe that many of the detailed exercises the RT has gone through in this review are no longer relevant, given the Temporary Specification to replace the RAA WHOIS requirements, Overall we believe it might have been preferable to put this review on hold until the Expedited Policy Development Process to replace the Temporary Specification (EPDP) (initiated to deal with this issue) had completed its work. Many of the assumptions of the first WHOIS Review team, on whose recommendations this report is based, appear to no longer be relevant, but of course, we do recognize that a primary role of a Review Team is to assess the implementation of the previous Review Team's recommendations.

Having said that, we do therefore approve of the group continuing its work once it started, and did not agree with the ICANN Org proposal to the GNSO Council to stop or restrict this review. While rationalization of the timing and scope of reviews appears to be overdue, this was not the way to go about it.

We have structured our comment in the following manner:

- General comments on the focus, presentation, and methodology of the report
- Comments on the recommendations

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[1] https://www.icann.org/en/system/files/files/draft-rds-whois2-review-31aug18-en.pdf

General comments on the focus, presentation, and methodology of the report

We recognize the challenges that this Review Team had to face as the work on compliance with the GDPR continued growing in intensity throughout the period in which work on addressing the 2012 recommendations continued. The fact that the 2012 report did not make any substantive recommendations regarding the respect of already existing legal rights that registrants had to data protection is significant and thus commenting on the failure to respect registrants privacy might be seen as difficult. However, the failure to address compliance with data protection law was and remains a significant risk to ICANN, which has caused a great deal of rushed work, a risk for stakeholders, and the first use of a temporary specification to replace the bottom-up multistakeholder policy development process. The current frantic work on the Expedited Policy Development Process (EPDP) also makes the 2012 Review somewhat irrelevant at the present time. Given the ability of review teams to set their own scope, and the benefit of hindsight, perhaps a more serious effort to reduce the size, costs, and effort spent on this exercise would have been in order.

There is an emphasis in several portions of the report on doing better outreach to stakeholders not normally contacted. This Review Team report is an important contribution to the overall review of ICANN activities with respect to registrant data, and therefore should be accessible. While there is a short list of terms in the appendix, we recommend for ease of reference that the first time an acronym is used, it be spelled out in its entirety. Given the length of this report, it would be a good idea to repeat this in each main section. An acronym list for easy reference would be helpful as appendix A. Similarly, the presentation of the report was not as thoughtful as it could have been, with sentences continuing across pages (where a page break could have added clarity) and the formatting not contributing to the report's legibility. The report could have also benefited from being proofread, as there were numerous typographical errors throughout.

The naming and cross-referencing of recommendations from one Review Team to the other are somewhat confusing (for example, CM4, R1, R1.1, LE 2). We suggest including a cross-reference index in the appendices and the executive summary, or to simply stick to the recommendations of the first review for numbering, not the sub-teams.

Comments on the Recommendations

WHOIS 1 rec 1. Making WHOIS a strategic priority

The research on how ICANN went about making WHOIS a strategic priority is impressive and informative. However, the fact that it ignored advice from the Data Protection Authorities repeatedly with respect to the 2013 RAA "policy" referenced here, ignored the passing of the GDPR in 2016 and failed to succeed in its Expert Working Group for new gTLD services despite a dissent that called attention to the failures in addressing privacy concerns strikes us as being remarkably obtuse.

In fact, ICANN was making the availability and release of accurate information about domain name registrants its strategic priority, which is rather different than making WHOIS a strategic priority. The focus was unilinear: how to enhance the accuracy of data collected, include new concepts such as "identifiability", and expedite the release of said data to third parties. Given the SSAC advice that WHOIS needed to be replaced by RDAP, the focus on WHOIS is also unfortunate.

WHOIS 2 rec 1.1 Board to put in place a forward-looking mechanism to monitor possible impacts on the RDS (WHOIS) from legislative and policy developments around the world. WHOIS rec 1.2 Board to assign responsibility and obtain regular updates

These recommendations hardly address the huge failure to address data protection that has taken place over the past five years, putting the organization at risk. With respect to this objective, the NCSG has consistently pointed out the requirement to comply with data protection law, it would suffice to listen to us and assign existing staff the task of researching the matters we have raised, or consulting key stakeholders. Risk management standard practice would suggest that failing to notice the drafting and adoption of the single-most edited piece of legislation in European history, a regulation adopted by 28 countries, the GDPR, was a failure in risk scanning, identification, prioritization, and mitigation.[2]

WHOIS rec 1.3 Update the Charter of the Board working group to ensure it is transparent.

We agree with this recommendation that any Board group that is tasked with examining the RDS issues should be transparent about its operations, findings, consultations, and any recommendations or conclusions. This is particularly true when, as in this case, significant sums of money have been expended flying them and ICANN staff to meet with data protection authorities (e.g. the large delegation sent to the International Conference of Data Protection and Privacy Commissioners held in Hong Kong in 2017).

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[2] The development of the GDPR began in 2009 with a public consultation launched by the European Commission followed by a series of speeches delivered by the then EU Justice Commissioner, Viviane Reding. The first draft of the GDPR was published in 2012, triggering a four-year process in Brussels, involving the European Parliament and the European Council, ongoing Commission input and intense lobbying efforts by business and civil society representatives which resulted in many thousands of amendments (4,000 were submitted to the European Parliament Committee on Civil Liberties, Justice and Home Affairs, alone). The text was finally agreed in December 2015 and the Regulation was formally adopted in April 2016, kicking-off the two-year implementation clock at a national level and for businesses preparing to comply. There is no excuse for the GDPR to have come as a surprise to ICANN.

WHOIS 1 rec 2 Single WHOIS Policy

We note the following passage on page 31:

> *In reporting their findings, the previous WHOIS 1 Review Team noted that being guided by the explicit language in the AoC regarding the existence of a single document labeled "WHOIS Policy" and despite assurances of its existence, they could not, after diligent searching, find " a clear, concise, well-communicated WHOIS Policy".*

Regrettably, we are no better off today, despite efforts to create a "digital artifact", a web page that lists all the WHOIS policies. We consider this recommendation a failure, although we appreciate all the research that went into the machinations ICANN initiated to come up with a policy. The relevant question that the Review 2 Team appears to have failed to ask, is why did all these efforts fail? In order to determine why ICANN continually fails to come up with a holistic WHOIS policy, perhaps an examination of the various efforts is overdue. It is a pity the Review team did not recommend an independent, expert review of why these various policy procedures fail.

Section 3.3.5, labeled Recommendations (p. 35-36)

This section is confusing. It states that the Review Team is making no recommendations, then under the heading makes four numbered statements that sound rather like recommendations about how to interpret current work. We suggest you either make them elsewhere or drop them.

WHOIS 1 Rec 3 Outreach

Clearly, a great deal of effort has gone into the analysis of outreach efforts by ICANN as it implemented this recommendation. We do not actually reach the same conclusion. Finding the data is at least as important as developing it, and the NCSG has repeatedly lamented the state of the ICANN website and the difficulty a novice (or even an expert with experience at ICANN) has in finding and interpreting the available data. We have recommended that ICANN hire a librarian and task them with assisting those who wish to find information on the website, as well as organizing the material properly, and preserving hyperlinks as a legacy, ensuring that the content remains available for the future. It might be advisable to recommend these improvements as an immediate assistance measure; in our view, the dust will not settle on the impact of GDPR for quite some time and in the meantime, end-users need accessible information (see your reference to deferring this work until no later than 2020, page 39).

R3.2 Identification of groups who require outreach efforts

It is not clear why this outreach needs to be done, and why it is a high priority, particularly given the lack of readiness of the data, and the current limbo situations with respect to any replacement for WHOIS or RDAP implementation. At the very least, there are much higher

priorities than identifying a target audience for information as yet unprepared. We would recommend dropping this recommendation.

WHOIS 1 Rec 4: Compliance

Once again, while the Review Team 2 was obliged to review the efforts which were made over the past five years to improve the compliance function at ICANN, it seems logical to defer work on determining what needs to happen with the compliance function until the dust has settled on the Temp Specification and the GDPR compliance requirements. ICANN will have a significant workload of its own on GDPR compliance, which may have to be undertaken by the same group.

We note in the findings that considerable expansion of the team has taken place (from 6 to 25 staff) but the previous team's recommendations regarding metrics seem rather skewed towards one set of priorities, namely third-party access to accurate data.

Rec 4.1 Take a risk-based approach to monitoring and mitigating accuracy issues.

If the inaccuracies in the records do not cause harm, we do not see any merit in ramping up monitoring. Surely systemic issues present themselves through inaccuracy reporting. Routine sampling is expensive, at a time of falling revenues.

Rec 4.2 Check for patterns of failure to validate and verify RDS data.

Given that the RAA will be under review because of GDPR, we recommend holding off on recommending new expenses (e.g. audits) until the new workload of the compliance team has been determined. Breach disclosures, for instance, are a new requirement for both controllers and processors; monitoring for unreported breaches might be a more worthy candidate for compliance action.

WHOIS 1 Recs 5-9 Data Accuracy

The Review Team has done a commendable amount of research on this item. Given the amount of change we anticipate with the implementation of GDPR on the data made available in the thin public WHOIS data, it seems premature to comment on all of the findings here. While we concur with the concept of data accuracy, the emphasis on contracts transferring liability for accuracy to the individual, on pain of losing their domain name, seems disproportionate and excessive. In particular, we would like to point out that there is an evident gap in the chain: many registered name holders obtain their domain names through a wilderness of resellers and have no idea who their accredited registrar and registry might be. This is not an argument for more fulsome WHOIS records; it is an argument for more transparency to end-users about how the system actually works, and clarity in their contracts. Fortunately, the GDPR will demand

such clarity, so there is quite a bit of work to do rectifying the gap in information for the registrant.

The Review Team has done great work in compiling the work that ICANN has done on registrants rights and responsibilities, and this report will be a good resource document for those who attempt to fix this problem. However, this very detailed section should remain a resource for this future work. We do not see the merit in developing new accuracy recommendations when the entire data set for publication is about to change.

R5.1 Check ARS tickets closed.

The NCSG recommends removing this recommendation unless as your footnote indicates, something arises which merits further action.

WHOIS 1 Rec. 10 Privacy Proxy Services

We agree that the Privacy Proxy Services Policy Development Process completed its work, which was subsequently approved by the GNSO Council, and the Implementation Review Team has been diligently working to implement the policy. However, we note with great concern that the costs of running this service appear to be very high. If legitimate, accredited PP services are priced out of the market, a great many end users may suffer a loss of privacy and may even be endangered. The final stages of the IRT were quite fractious, and we would not want to see these services be accredited, but without any registrars willing to run them, this merely turns end-users over to the unregulated marketplace again. We note the emphasis in this section, yet again, on data accuracy, not on services available to registrants.

R 10.1 Impose privacy proxy data verification on registrars in the RAA

If registrars do not object to this requirement, we cannot see a reason to object. However, the first recommendation on Privacy Proxy Services would be to do a financial review to ensure that the results of the IRT have not forced the service out of the marketplace. There is no focus on cost in this document, and maintaining an open and accessible domain space demands a focus on cost.

WHOIS 1. Rec 11 Common Interface

Rec 11.1 Metrics

Given the state of flux of the data returned in response to queries, perhaps defining metrics is a low priority at this moment. We recommend dropping this one.

Rec 11.2   Continue the common interface

We support this recommendation.

WHOIS 1 Recs 12-14 Internationalized Registration Data

We agree with deferring further work on this topic.

WHOIS 1 Recs 15-16 Plan and Annual reports

While we agree that the plan and reporting requirements were met, the fact remains that the WHOIS implementation management was inadequate: it continued on as directed by the WHOIS 1 Review Team, until it hit a wall around the summer of 2017, when the registrars and registries objected strenuously to the risks they were running under the GDPR. So the plan and the annual reports failed to recognize and manage new risks, or vary the approaches to WHOIS policy development, or take on board criticism either internally from stakeholders such as the NCSG, or from the many letters from the data protection authorities addressing a number of different issues.

Rec 15.1 Best practice project management methodology

As currently drafted, this recommendation sounds good but it is rather opaque. Will it prevent ICANN from continuing to drive the train into the brick wall at the end of the tunnel? A bit more discussion of risk scanning and ongoing risk management might improve this recommendation. We would, therefore, disagree with your comment on page 84 that the GDPR has no impact on this recommendation; if the WHOIS Review Teams are dictating the action plan for WHOIS improvement, then there must be flexibility to map projects to reality as time passes between reviews. This leads us into the next section.

Objective 2: Address anything new

The inventory of activities, policies, and procedures will be useful to help guide the GNSO when it determines priorities for subsequent PDPs after the Temporary Specification is either dealt with or disappears in May 2019.

Objective 3: Law Enforcement Needs

LE.1 ICANN to conduct regular surveys of law enforcement needs and satisfaction.

We fail to see why ICANN should conduct studies to determine whether third parties are achieving their desired results in accessing registrant data. By all means, this relatively well-funded area of Internet business (referring here to the security community that acts to safeguard the Internet for commerce) may present survey data to ICANN, the Compliance department, and the SSAC, but in a time of falling revenues and new compliance costs related to the GDPR, we think this recommendation should be withdrawn.

In the interest of transparency the NCSG requests that the costs of the current survey be included in the report. Surveys are useful, but they are not cheap, if properly done.

LE.2 Cooperate with law enforcement to do surveys.

If law enforcement bodies wish to conduct surveys, ICANN should within reason cooperate, however, this recommendation should be reworded to clarify who pays for the research.Given the current state of flux in GDPR compliance, no action on surveys of law enforcement satisfaction should be taken until the state of registrant data access is stabilized.

Objective 9: ICANN Bylaws

BY.1 Should be removed or changed to reinforce compliance with data protection law more clearly

The NCSG does not support the recommendation to delete "safeguarding registrant data" from section 4.6(e)(ii) of the ICANN Bylaws.

We understand from examining the discussion on page 129 that the goal behind this recommendation was to eliminate reference to the OECD Guidelines, and to replace it with reference to data protection law and best practice (with a view to compliance), but as currently worded the recommendation does not do this. It sounds like the team is recommending the elimination of the reference to "safeguarding registrant data" in ICANN Bylaws section 4.6(e(ii). If this is not indeed the intention, the recommendation must be reworded to precisely state its intention.

Conclusion

The NCSG appreciates this opportunity to provide the RDS II Review Team with our input on its initial report and preliminary recommendations. Thank you.