**Appendix 4: Statement of Stephanie Perrin**

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

**Operations of the WHOIS conflicts WG**

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

The process has not been invoked largely, in my view, because the pressure has been taken off data protection law as a mechanism for registrants to protect their privacy. Registrants make use of privacy proxy services to protect their data. If the current work of the Privacy Proxy Services Accreditation Issues Working Group (PPSAI-WG) comes to fruition, there will be more requirements demanded of service providers, and it may become more difficult/expensive for registrants to keep their personal data out of the WHOIS directory. If this were to transpire, it seems likely to me (and I will admit that this is speculation at this point) that registrants may take an interest in complaining about the failure of registrars to comply with data protection law. The fact that this situation does not apply in the US because of the lack of applicable data protection law does not make it irrelevant, despite the fact that ICANN is a California corporation. Data protection law now applies in over 101 countries[[1]](#footnote-1), and it seems far more logical, and compliant with ICANN’s obligations to act in the public interest, to comply with law rather than persist in demanding the disclosure of personal information in a public directory unless a competent authority threatens to enforce the law. To insist on a policy that does not acko

The question immediately arises, and of course has been debated at length in our group, “How do you know that the practice of putting the data in WHOIS is not in compliance with law, absent an enforceable order?” Quite simply, the two most relevant associations of global data protection authorities, the Article 29 Working Party on Data Protection[[2]](#footnote-2), and the International Working Group on Data Protection in Telecommunications and Media (IWGDPT) have said so. They have been expressing their concerns about WHOIS to ICANN since 1998. The following table outlines their publications and letters on various WHOIS-related matters.

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| --- | --- | --- | --- |
| **Interventions of international Data Protection Authorities relating to ICANN** | | | |
| **DATE** | **AUTHOR** | **TITLE** | **DESCRIPTION** |
| 1998 | IWGDPT | Common position on Reverse Directories | Consent and transparency required  Referenced in Art 29 re WHOIS |
| 2000 | IWGDPT | Common position on WHOIS | State purpose, restrict data published, restrict marketing and secondary use |
| 2000 | IWGDPT | Ten commandments for privacy on the Internet | Virtual right to be let alone restricts directory listings |
| 2001 | Art 29 WP | Comments to EC on WHOIS | EC requested comments on WIPO issues and WHOIS |
| 2003 | EC DG15[[3]](#footnote-3) | Comments on WHOIS | Notes reverse directories, purpose |
| 2003 | IWGDPT | Letter to ICANN re Names Council WHOIS task force | Notes earlier interventions, purpose |
| 2003 | Art 29 WP | Opinion on WHOIS 2/2003 | Summary of views |
| 2005 | IWGDPT | Letter to IWGIG[[4]](#footnote-4) to express interest in cooperation | Explains who they are and that they are interested in Internet issues |
| 2006 | Art 29 WP | Letter to ICANN (Cerf) re WHOIS review | Expresses same concerns |
| 2013 | Art 29 WP | Letter to Crocker re 2013 RAA & waivers | All 26 data commissioners agree that their registrars will require a waiver of RAA requirements re WHOIS |
| 2014 | Art 29 WP | Letter to ICANN re their status and 2013 RAA | Reaffirms that Art 29 group has authority, all DPAs represented and can sign |
| 2014 | EDPS[[5]](#footnote-5) | Letter to ICANN re data retention and recent decision of ECJ | Data retention practices required by RAA are not in compliance with EU Charter of Rights |

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

**The Trigger Mechanisms**

The existing policy and trigger mechanisms reflect at best a basic failure to comprehend the way data protection law works, at worst a determination to be as difficult and intransigent as possible. Most data protection authorities do not provide advice as to how they view a data protection issue, they issue findings upon receipt of a complaint. Requiring that a registrar produce a letter from a data protection authority indicating that compliance with contractual requirements is against the law in most situations means they would have to break the law, get someone to complain, and be found guilty (and liable to fines). This would produce a letter of finding, from a competent authority, with details as to how the matter would be enforced. This can hardly be a satisfactory situation for the registrar stakeholder group, however, particularly given the fact that if there is publicity about the case, many more complaints may ensue.

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

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

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

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

1. Greenleaf, Graham. 2015. Asian Data Protection Law: Trade and Human rights Perspectives, p. 6-7. Citing his footnote 7, “The geographical distribution of the current 101 laws by region is: EU (28); other European (27); Asia (12); Latin America (9); Africa (11); North Africa/Middle East (6); Caribbean (4); North America (2); Australasia (2); Central Asia (2); Pacific Islands (0).” [↑](#footnote-ref-1)
2. The Article 29 Working Party was established through the authority of Article 29 of the European Data Protection Directive 95/46. It is supported by the European Commission, elects its Chairman, meets regularly, and is tasked with harmonizing the approach to the determination of adequacy of relevant data protection law, for the purposes of onward transfers of the data of EU citizens. The group also attempts to reach common positions on the interpretation of data protection law with respect to critical issues. [↑](#footnote-ref-2)
3. European Commission, DG 15 or Internal Market, responsible for the Data Protection Directive 95/46 [↑](#footnote-ref-3)
4. International Working Group on Internet Governance [↑](#footnote-ref-4)
5. European Data Protection Supervisor, responsible for oversight of the European Commission, the European Parliament and related European institutions with respect to their compliance with applicable data protection law. The Office also has a key role in consultation and cooperation to ensure a harmonized approach to compliance with applicable data protection law. [↑](#footnote-ref-5)