

## Memorandum

To: Data protection Officials & Privacy community  
From: Professor Milton Mueller, Kathryn Kleiman, Esq.  
Date: June 14, 2006

***Alert: ICANN's Privacy Progress in the Whois Databases Being Derailed by US and Australian Governments; Timely Communication to ICANN Will Help Balance and Inform Debate***

We need your help. As you know, after years of work on data protection laws, ICANN's GNSO Council finally took concrete steps to protect privacy in the Whois databases. On April 12, 2006, the GNSO Council adopted a clearly defined "Purpose" for the Whois Databases – one that is narrow, technical and compatible with the original purpose of this data. At last, we followed your opinions, speeches and guidance!

Opposition began immediately. The US Government is using every forum with ICANN, public and private, to criticize the vote. Statements of Suzanne Sene, US Department of Commerce/NTIA, openly question whether data protection laws apply to ICANN, and whether data protection commissioners have enforcement powers.

Following the US lead, the Australian Government quickly wrote to criticize the Whois vote. Australia's letter called for all personal data in the Whois database to remain fully open and completely accessible. *Letter attached below.* This week, the International Trademark Association, a group with historic weight in the ICANN process, loudly voiced its concerns and urged ICANN Chairman Vint Cerf to reverse the Whois privacy work and keep all data (personal and otherwise) open and accessible.

The GNSO Council's vote represented a historical alignment. Registrars, Registries and ICANN's Noncommercial Users Constituency all voted to respect data protection laws worldwide. Yet the GNSO Council is only an interim step. As one of ICANN's "Supporting Organizations," we only report our policy recommendations to the ICANN Board. The ICANN Board, Officers and staff make the final decisions. We know they listen carefully to loud voices – and rely increasingly on ICANN's Government Advisory Committee ("the GAC").

Opposition continues to mount through the US-led GAC. As you know, the GAC never held its long-promised meeting with Data Protection Commissioners. To date it has only heard law enforcement and "consumer protection" views, and thus, it puts forward only law enforcement and consumer protection views.

We learned today that at the ICANN meeting in Marrakech, the GAC will sponsor a Joint GAC/GNSO meeting on Whois -- with at least five GAC speakers. We expect each speaker to urge the GNSO to repeal the Purpose of Whois. (Meeting scheduled for Monday, June 26, 10:30 AM – 12:30 PM.) Despite so many members from countries with comprehensive data protection laws, GAC's current message is an anti-privacy

message one: the Whois databases must remain completely open and accessible, with no protection for the personal data of tens of millions of domain name registrants.

Unfortunately, ICANN has yet to receive a single letter in support of the work of the GNSO Council on the Purpose of Whois. **Would you be willing to write to ICANN in support of the GNSO Council work to date? Would you be willing to work with your GAC representative to help him/her better understand and explain your country's data protection laws to the GAC and to ICANN?**

We know ICANN well. Input now would greatly help to balance the debate, dampen the impact of law enforcement criticism, and guide ICANN Board members, officers and staff. This is a critical moment.

Thank you for your review and assistance. Please let us know if there is anything we can do to assist you. Are there other data protection leaders you recommend we contact?

Sincerely,

Professor Milton Mueller, Syracuse University  
Kathryn Kleiman, Esq., McLeod, Watkinson & Miller, Washington DC

Co-Founders, ICANN's Noncommercial Users Constituency  
Longtime Members, GNSO's Whois Task Force

## Appendix I: Supplemental Materials on Whois Purpose

### A. *Background/GNSO Council Work on Purpose of Whois*

On April 12, 2006, the GNSO Council took a pro-privacy position. They determined that the Whois database serves a narrow, technical purpose (consistent with the original purpose of ICANN and the limited mission of ICANN).

As adopted by the GNSO Council:

*“The purpose of the gTLD Whois service is to provide information sufficient to contact a responsible party for a particular gTLD domain name who can resolve, or reliably pass on data to a party who can resolve, issues related to the configuration of the records associated with the domain name within a DNS nameserver.”*

This technical language means that the Whois databases will serve the narrow, technical and traditional purposes of the Domain Name System – registration of domain names (setting them up) and configuration of domain names (making sure domain names can be “resolved” or located in the global domain name system via the main “look-up” tables).

The Purpose adopted by Council was originally called “Formulation 1.” In adopting it, the GNSO Council rejected “Formulation 2” – an unbounded and unlimited Purpose for the Whois Databases (based not only on traditional technical purposes, but all uses of domain names, including content of websites). It is a view oriented in digital rights management.

**Formulation 2 (Rejected as overbroad, inconsistent with original purpose, and outside the scope and mission of ICANN and the domain name system):**

*“The purpose of the gTLD Whois service is to provide information sufficient to contact a responsible party or parties for a particular gTLD domain name who can resolve, or reliably pass on data to a party who can resolve, technical, legal or other issues related to the registration or use of a domain name.” [emphasis added]*

Minutes of the GNSO Council’s vote on the Purpose of Whois can be found at <http://www.gns0.icann.org/meetings/minutes-gns0-12apr06.shtml>.

**B. *Opposition Heard To Date:***

The negative voices are strong within ICANN. Many are quietly lobbying in the background; others are public. Here are some letters of opposition that we know have been widely circulated to the Board, Officers and staff of ICANN:

*Opposition by the Australian Government*, <http://www.gnso.icann.org/mailing-lists/archives/council/msg02407.html> (especially ironic because the Australian ccTLD, .AU, has some of the strongest data protection regulations of any country code, and protects not only personal data but corporate data as well).

*International Trademark Association*, <http://forum.icann.org/lists/gnso-dow123/msg01000.html> (for historical reasons, a group with close ties to the ICANN Board and a heavyweight in the ICANN process).

Letters in support of the GNSO Council and the combined efforts of the Registrar, Registry and Noncommercial Constituencies (and Nominating Committee Representatives): None.

### **C. Timely Support for the GNSO Work**

ICANN starts a meeting in Marrakech on June 23<sup>rd</sup>. The Whois Task Force just learned today that the GAC plans to have at least five speakers giving strong anti-privacy speeches (intended to block the Whois work).

Some opportunities for input include:

**1. Contacting your country's GAC representative.** The GAC is a loosely organized group with no official requirements for government representatives. It is also completely closed to other members of the ICANN community. We are told that discussions of data protection laws are non-existent in GAC meetings (and the US canceled the only formal data protection meeting to have taken place in GAC with Dr. Dix). With your encouragement and guidance, perhaps your GAC representatives will take a clearer position at GAC meetings in support of (and explaining) the EU data protection laws.

#### **GAC representatives:**

**Canada:** *Mr Malcolm Andrew, Industry Canada,*  
[andrew.malcolm@ic.gc.ca](mailto:andrew.malcolm@ic.gc.ca)

**Germany:** *Mr Michael Leibrandt*  
*Federal Ministry of Economics, Technology and Labour*  
[leibrandt@bmwi.bund.de](mailto:leibrandt@bmwi.bund.de)

**Italy:** *Mr Stefano Trumpy, Vice Chair*  
*Institute of Informatics and Telematics of the National Council for*  
*Research, stefano.trumpy@iit.cnr.it*  
*and*  
*Mrs Luisa Franchina, Ministry of Communications*  
[luisa.franchina@comunicazioni.it](mailto:luisa.franchina@comunicazioni.it)

**EC:** *Mr Michael Niebel, Head Of Unit*  
*Directorate General for the Information Society and the Media*  
*(DG INFSO), michael.niebel@cec.eu.int*

Mr William Dee, *DG INFSO, william.dee@cec.eu.int*

Source: <http://gac.icann.org/web/contact/rep/index.shtml>

**2. Participating in a GAC meeting.** The GAC Meetings in Marrakech are:

- June 24-June 25 (closed GAC meetings – GAC only)
- Monday, June 26<sup>th</sup>, Joint GAC/GNSO Meeting with many anti-privacy speeches planned by GAC.

The GAC is loosely organized with no clear membership requirement other than government credentials. The US NTIA regularly adds FBI agents and Federal Trade Commission staff to its “delegation,” and these officials participate actively in the closed GAC discussion on Whois. They influence the debate and push GAC to keep Whois open and completely accessible, without any data protection. Were you to attend a meeting, you would have a similar opportunity to participate in this closed forum.

**3. Send a Personal Letter to ICANN Chairman Vint Cerf and/or President Paul Twomey (former Chair of GAC from Australia).** They are closely reading letters on the Whois issue and, to date, have only receive letters critical to the work of the GNSO Council.

Email addresses: [Vint@google.com](mailto:Vint@google.com) and [Twomey@icann.org](mailto:Twomey@icann.org)

**4. Share such letters with GNSO Council Chairman Bruce Tonkin of Melbourne IT.** He circulates them to all GNSO Constituencies.

Email address: [bruce.tonkin@melbourneit.com.au](mailto:bruce.tonkin@melbourneit.com.au).

**5. Participate in the GAC/GNSO meeting on Whois -- Monday, June 26th-- in person, by teleconference or by videotaped message.** We can assist you with the logistics of requesting remote participation. It would be hard for GAC to turn down your offer to participate, particularly if it came as a request from your country’s GAC representative.

Date: Monday, June 26<sup>th</sup>, 10:30 AM – 12:30 PM

**6. Ask your GAC representative to deliver a message from you at the GAC meeting (perhaps including a copy of a letter from you to the GAC and ICANN).**

**7. Encourage your GAC representative to meet with us.** Milton and I are ready to hold meetings in Marrakech with GAC representatives to share our detailed knowledge of the background, history and abuses of the Whois database (including stalking, harassing, spamming and profiling). With your urging, perhaps we could hold these meetings (Kathryn Kleiman arrives in Marrakech on Thursday, June 22<sup>nd</sup>).

Email: [Kathy@KathyKleiman.com](mailto:Kathy@KathyKleiman.com)  
[Mueller@syr.edu](mailto:Mueller@syr.edu)

**Appendix II:**  
**Letter to ICANN from Australian Government, April 13, 2006,**  
<http://www.gnso.icann.org/mailing-lists/archives/council/msg02407.html>

**[council] Input from the Australian Government on the WHOIS service**

- *To:* <council@xxxxxxxxxxxxxxxx>
- *Subject:* [council] Input from the Australian Government on the WHOIS service
- *From:* "Bruce Tonkin" <Bruce.Tonkin@xxxxxxxxxxxxxxxx>
- *Date:* Thu, 13 Apr 2006 21:14:22 +1000
- *Cc:* <gnso-dow123@xxxxxxxxxxxxxxxx>
- *Sender:* owner-council@xxxxxxxxxxxxxxxx
- *Thread-index:* AcZe62pF2rsC2Ox1RTm5WvMNEaTPRQ==
- *Thread-topic:* Input from the Australian Government on the WHOIS service

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Hello All,

The note below was sent to me four hours ago as chair of the GNSO Council.

Regards,  
Bruce Tonkin

AUSTRALIA'S CONTRIBUTION TO GNSO COUNCIL ON WHOIS

Australia would like to reiterate to the GNSO Council the position it conveyed during the GNSO Council - Government Advisory Committee (GAC) Working Group meeting on 26 March 2006.

On the information available to us, Formulation 2, as identified in the Final Task Force Report on the Purpose of Whois and of the Whois Contacts, appears to better reflect the public policy interests of a fully functional Whois regime from an Australian perspective.

At this point, Australia considers that Whois should:

- \* satisfy the traditional and ongoing goal of ensuring the security and stability of the Internet;
- \* provide the ability to identify and respond to those involved in criminal activity such as child pornography, 'phishing' and identity theft;
- \* provide an appropriate level of data to any user that seeks it including, for example, civil and criminal law enforcement officials, online consumers, network operators, intellectual property rights holders and registrars and registries;



\* support national laws and global agreements associated with privacy, trade practices, consumer protection, intellectual property rights and copyright protection; and

\* operate in a manner that is technically feasible and cost effective for registrars and registries, and does not rely solely on the registrant to be implementable.

We appreciate that Whois is a complex issue with a range of interests. Given this, we consider that it is important that the GAC and GNSO Council continue to exchange information and views.

Australia will work with other GAC members to ensure that the GAC is well placed to have effective dialogue with the GNSO community in Marrakesh.

ASHLEY CROSS  
GAC Representative -AUSTRALIA  
**April 2006**