

# Motions 29 September 2016

## 1. Draft Motion - GNSO Validation of CCWG-Accountability Budget Request

Made By: James Bladel

Seconded by: Keith Drazek & Julf Helsingius

WHEREAS,

1. Per its Charter, the Project Cost Support Team (PCST) has supported the CCWG-Accountability in developing a draft budget and cost-control processes for the CCWG-Accountability activities for FY17, and has also developed a historical analysis of all the transition costs to date (see <https://gnso.icann.org/mailling-lists/archives/council/pdfpklU5q6Ojg.pdf>).
2. The CCWG-Accountability FY17 budget was presented at its plenary meeting of June 21st and approved for transmission to the Chartering Organizations for validation as per the process agreed with the PCST. This request for validation was received on 23 June.
3. Following review and discussion during ICANN56, the GNSO Council requested a webinar on this topic which was held on 23 August (see transcript at <https://gnso.icann.org/en/meetings/transcript-ccwg-accountability-webinar-23aug16-en.pdf>, recording at <http://audio.icann.org/gnso/gnso-ccwg-accountability-webinar-23aug16-en.mp3> and AC recording at <https://icann.adobeconnect.com/p8fu99qpt7d/>).
4. The GNSO Council notes that many members of the GNSO community have expressed the view that the projected budget does not likely support revisiting the topic of the jurisdiction of ICANN's organization in that such exploration would likely require substantial independent legal advice on alternative jurisdictions and their potential impact on the text and structure of ICANN's Bylaws.
5. The GNSO Council has discussed and reviewed all the relevant materials.

RESOLVED,

1. The GNSO Council hereby accepts the proposed CCWG-Accountability FY17 budget, as well as the cost-control processes presented in conjunction with the CCWG budget, expects the working groups to be restrained and judicious in their use of outside legal assistance, and believes that the Legal Committee should exercise reasonable and effective controls in evaluating requests for outside legal assistance and should approve them only when deemed essential to assist a working group to fully and objectively understand and develop a particular course of action for which the group has reached a substantial degree of consensus and requires legal advice on its risks and feasibility.
2. The GNSO Council expects to receive regular updates on actual expenditures as tracked against this adopted budget, and reserves the right to provide further input on the budget allocation in relation to the CCWG-Accountability related activities.
3. The GNSO Council expects ICANN staff, including its office of General Counsel, to provide the assistance requested by the CCWG and its working groups in an expeditious, comprehensive, and unbiased manner.
4. The GNSO Council expects the CCWG-Accountability and staff to work within the constraints of this approved budget, and that excess costs or request for additional funding beyond said budget should be recommended by the Legal Committee only when deemed essential to completion of the CCWG's work and objectives.
5. It is the position of the GNSO Council that revisiting the jurisdiction or organization of the ICANN legal entity, as established by CCWG-Accountability Work Stream 1, would not likely be supported by this projected budget and, further, that such inquiry should not be undertaken at this time because the new accountability measures are all premised and dependent on California jurisdiction for their effective operation, and any near-term changes in organizational jurisdiction could be extremely destabilizing for ICANN and its community.
6. The GNSO Council requests the GNSO Secretariat to communicate this resolution to the CCWG-Accountability Chairs, and to the office of the ICANN CFO.

## **2. Motion on the interim appointment of the GNSO Representative on the Empowered Community Administration**

Made by: James Bladel

Seconded by: Amr Elsadr

### **WHEREAS**

As stated in Section 1.1(a) of Article 6 of the new ICANN Bylaws, concerning the composition and organization of the Empowered Community (EC), "The Empowered Community ("EC") shall be a nonprofit association formed under the laws of the State of California consisting of the ASO, the ccNSO, the GNSO, the ALAC and the GAC (each a "Decisional Participant" or "associate," and collectively, the "Decisional Participants")."

The sole purpose of the EC is to exercise its rights and perform its obligations under ICANN's Articles of Incorporation and the ICANN Bylaws, and the EC shall have no other powers or rights except as expressly provided in the ICANN Bylaws. The EC may only act as provided in these Bylaws. Any act of the EC that is not in accordance with these Bylaws shall not be effective.

As outlined in section 6.3 of the new ICANN Bylaws, the GNSO, as a Decisional Participant, shall act through its respective chair or such other person as may be designated by the GNSO (collectively, such persons from all communities are the "EC Administration"). Each Decisional Participant shall deliver annually a written certification from its chair or co-chairs to the ICANN Secretary designating the individual who shall represent the Decisional Participant on the EC Administration.

The GNSO created a Drafting Team (DT) on 30 June 2016 to identify the GNSO's new rights and obligations, and work with ICANN staff to prepare an implementation plan to address any needed changes by 30 September (see <http://gns0.icann.org/en/council/resolutions> - 201606).

### **RESOLVED**

1. The GNSO Council hereby confirms that the GNSO Chair (currently James Bladel) will represent the GNSO as the Decisional Participant on the Empowered Community Administration on an interim basis.
2. The GNSO representative shall act solely as directed by the GNSO Council in accordance with the ICANN Bylaws and other related GNSO Operating Procedures.
3. Within three months after the completion of the work of the GNSO Rights & Obligations under Revised ICANN Bylaws Drafting Team and adoption of its recommendations by the GNSO Council, the GNSO is expected to finalize its decision on the appointment of the person designated to represent the GNSO as the Decisional Participant on the Empowered Community Administration and will communicate this accordingly to the ICANN Secretary.
4. The GNSO Council requests the GNSO Secretariat to communicate this decision to the ICANN Secretary which will serve as the required written certification from the GNSO Chair designating the individual who shall represent the Decisional Participant on the EC Administration.

**3. 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.**

### **MOTION WITHDRAWN**

Made by: Stephanie Perrin

Seconded by:

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](#), 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://gns0.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://gns0.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.