Early Draft Report on Subgroup B deliberations

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This group (Whois Working Group Subgroup B) was chartered to "Determine how and which legitimate third parties may access registration data that is no longer available for unrestricted, public, query-based access."

The group began by creating a template for describing proposals to obtain data shielded by the post-OPoC Whois recommendation. The template divided proposals into 4 basic elements:

- Which third parties?
- How are they certified as legitimate?
- What type of access is delivered and what methods are used?
- What costs are incurred and who bears them?

10 proposals conforming to this template were received. The template and all the proposals are attached as an appendix to this report.

Discussion and debate eventually centered on two key aspects of the proposals:

- How eligible third parties should be defined or recognized
- What level of access should be granted

The issue of cost and cost distribution would also likely prove to be contentious, but these issues cannot be confronted fully until consensus is achieved on the basic properties of a proposal. We did not get that far.

Eligible third parties

A basic distinction between public law enforcement agencies (LEAs) and private actors was recognized by the members of the group. There were also proposals focused on the needs of particular business sectors.

Public LEAs. Most if not all participants seem to be willing to grant LEAs access to the data elements that would be shielded by the post-OPoC Whois. There are varying views of how restrictive the conditions should be and how much reliance should be placed on national laws. It was recognized that mechanisms for certifying status as a LEA do exist; e.g., Interpol, national agencies.

Private parties. Within the private actors category, there is much more disagreement. Some participants believe that it is not necessary to define special mechanisms for access by private parties at all; they believe that private parties can rely on the post-OPoC Whois and indirect access via LEAs. Some participants advanced a category-based approach to defining a legitimate third party, with categories including such things as "governmentally-chartered banks," "IP attorneys;" "corporations with intellectual

property;" "e-commerce consumers;" and many others. Some participants believe that any private actor, whether corporate or individual, can have a legitimate need to access the shielded Whois data elements of a particular registrant at a particular time, and that access mechanisms should be uniform across all categories of private actor. There were some suggestions that private parties obtain access to data indirectly, via their national LEAs. None of these proposals incorporated well-defined, rigorous methods for certifying the legitimacy of private actors; most relied on some form of affidavit and the ex post threat of discovery of abuse of access privileges.

Special sectors. There was also debate about the validity of sector-based proposals for private party access, particularly in regard to the banking sector. The advocate for a distinctive approach to access for banks noted the special incidence of phishing in that sector and the high financial stakes. There was agreement that a well-defined method of certifying banks is available (at least, in the USA and other developed countries). Critics of that approach worried that establishing special rights and privileges for a distinct sector could lead to an endless proliferation of similar claims by other groups and seriously complicate the task of defining, assigning and monitoring access rights.

Propositions suggested by the Chair:

a. There is consensus that LEAs can be recognized categorically as a party with a legitimate need for access.

b. The subgroup will not be able to achieve consensus or even majority agreement on private party access; therefore we should, in our remaining time, concentrate exclusively on reaching agreement on the mechanisms and type of access to be granted LEAs.

c. We should hold a straw poll on whether a special sectoral approach for banks has support

Degree of access granted

The group recognized that various degrees of access can be granted. Three basic types were identified:

1. Access limited to the records of the particular domains and/or registrants suspected of causing problems at a specific time
2. Query-based access to any domain, but limited in time
3. Query-based or bulk access to any domain, for an unlimited time

Almost everyone seems to be willing to grant public law enforcement agencies (LEAs) engaged in legitimate enforcement activities broad, ongoing access to the data elements shielded by the OPoC proposal (type 2 or even type 3 access). There is recognition that LEAs, like private parties, can abuse their access to the data (e.g., to harass or monitor dissenters) and some suggestions that there should be some due process and/or recordkeeping or monitoring of LEA use of the data.

With respect to private actors, a key division among the group surfaced around the following issue:

- Some stakeholders want qualified private actors to have unlimited access to all Whois records once they are deemed a "legitimate party." (Type 2 access)

- Other stakeholders insist that one can have a legitimate need only in relation to specific domain name registrations and specific problems. Grants of access, therefore, must be limited to the Whois records of the registrants causing or suspected of causing a problem. (Type 1 access)

This difference has important implications for defining mechanisms:

- If a more expansive definition of access is granted, there will be stronger pressure to restrict who is considered a "legitimate third party," and a much stronger need to monitor and enforce sanctions against abuse. Also, this approach may be illegal in some nations.

- If the narrower concept of access is granted, there is less need for oversight and enforcement and we can be less restrictive about how we recognize eligible third parties. But unless the process of handling requests is rapid and efficient enough, Type 1 access may not be viable for third parties who make a large number of requests for access.

Propositions suggested by the chair:

d. We should hold a straw poll on the degree of support that exists for the principle that private parties should only be granted Type 1 access