

Initial Report on the Implementation Advisory Group Review of Existing ICANN Procedure for Handling WHOIS Conflicts with Privacy Laws

STATUS OF THIS DOCUMENT

This is the Initial Report of the Implementation Advisory Group to Review Existing ICANN Procedure for Handling WHOIS Conflicts with Privacy Laws, prepared by ICANN staff for public comment and submission to the GNSO Council on XX July 2015. ICANN staff will prepare a Final Report following the IAG's review of the public comments received on this Initial Report.

SUMMARY

This report is submitted to the GNSO Council and posted for public comment by the Implementation Advisory Group to Review Existing ICANN Procedure for Handling WHOIS Conflicts with Privacy Laws.

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1. Executive Summary

1.1 Background

In November 2005, the Generic Names Supporting Organization (GNSO) [concluded a policy development process \(PDP\)](#) on WHOIS conflicts with privacy law which recommended that “In order to facilitate reconciliation of any conflicts between local/national mandatory privacy laws or regulations and applicable provisions of the ICANN contract regarding the collection, display and distribution of personal data via the gTLD WHOIS service, ICANN should:

- Develop and publicly document a procedure for dealing with the situation in which a registrar or registry can credibly demonstrate that it is legally prevented by local/national privacy laws or regulations from fully complying with applicable provisions of its ICANN contract regarding the collection, display and distribution of personal data via WHOIS.
- Create goals for the procedure which include:
 - Ensuring that ICANN staff is informed of a conflict at the earliest appropriate juncture;
 - Resolving the conflict, if possible, in a manner conducive to ICANN's Mission, applicable Core Values, and the stability and uniformity of the WHOIS system;
 - Providing a mechanism for the recognition, if appropriate, in circumstances where the conflict cannot be otherwise resolved, of an exception to contractual obligations to those registries/registrars to which the specific conflict applies with regard to collection, display and distribution of personally identifiable data via WHOIS; and
 - Preserving sufficient flexibility for ICANN staff to respond to particular factual situations as they arise”.

The ICANN Board adopted the recommendations in May 2006 and the final Procedure was made effective in January 2008. Although to date no registrar or registry operator has formally invoked the Procedure, concerns have been expressed both by public authorities as well as registrars and registry operators concerning potential conflicts between WHOIS contractual obligations and local law.

Given that the WHOIS Procedure has not been invoked and yet numerous concerns have arisen from contracted parties and the wider community, ICANN launched a review as provided for in Step Six of the Procedure, which calls for an annual review of the Procedure's effectiveness. The [review](#) was launched with the publication of a paper for public comment on 22 May 2014. The paper outlined the Procedure's steps and invited public comments on a series of questions. Following review of the public comments received, this Implementation Advisory Group (IAG) was formed to consider the need for changes to how the Procedure is invoked and used. A few common themes were discerned from some of the suggestions in the public comments, which may allow for changes to implementation of the Procedure in line with the underlying policy.

1.2 Deliberations of the Implementation Advisory Group

The IAG started its work on 7 January 2015. The IAG conducted its deliberations primarily through monthly conference calls, in addition to discussions on its mailing list. Section 5 provides an overview of the deliberations of the WG conducted by conference call as well as through e-mail threads.

The IAG's work is based on the issues and questions laid out in its [Mission and Scope](#). It should be noted that the IAG spent the majority of its deliberations on the second issue, "Trigger: What triggers would be appropriate for invoking the Procedure?."

The IAG's findings and initial recommendations for each of these Charter questions can be found in full in Section 7 of this Initial Report. They are also summarized in Section 1.3 below.

1.3 IAG Preliminary Recommendations

The following sub-sections provide a summary of the IAG's preliminary conclusions as follows:

- Section 1.3.1 contains all the IAG's preliminarily-agreed recommendations;
- Section 1.3.2 contains the IAG's conflicting views regarding the appropriate triggers for invoking the procedure.

The full text of all of the IAG's preliminary conclusions, including any supplemental notes, are set out in detail in Section 7. Square brackets in this document generally indicate alternative formulations on the

same topic that are under consideration by the IAG. Commenters are encouraged to specify which formulation they prefer, and why.

While community input is being sought on all aspects of this report, including the IAG's preliminarily agreed recommendations, the IAG would particularly welcome specific public comments on those of its deliberations, proposals and options for which there is currently no IAG consensus.

1.3.1 Summary of the IAG's agreed preliminary conclusions

The IAG has reached preliminary agreement on the following recommendation:

Proposed Alternative Trigger

- Currently, the [Procedure](#) recognizes only one trigger for purposes of seeking relief from the conflict of a WHOIS obligation and national privacy law. The registry/registrar must have received "notification of an investigation, litigation, regulatory proceeding or other government or civil action that might affect its compliance."
- Under the "Alternative Trigger" proposal, a contracted party would not have to wait to receive notification of a proceeding against it. Rather, it could seek 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 submit that statement to ICANN.

1.3.2 Specific topics on which there is currently no consensus within the WG

Written Legal Opinion Trigger

- A number of IAG members supported the addition of a trigger consisting of a written legal opinion from a nationally recognized law firm. The firm's opinion must state that national laws or statutes in the country of incorporation of a contracted party will affect its compliance with the provisions of the Registrar Accreditation Agreement or other contractual agreement with ICANN dealing with the collection, display or distribution of personally identifiable data via WHOIS.

Public comment is therefore specifically invited on the following questions:

- Should the Procedure include a trigger consisting solely of a nationally recognized law firm opinion? If so, why, and if not, why not?
- Do you think that a nationally recognized law firm opinion can by itself credibly demonstrate that a party is legally prevented by local law from complying with its WHOIS obligations? Would subjecting the law firm opinion to public comment (including from the relevant GAC member, if any) increase the credibility of the law firm opinion?

- How feasible is it for a contracted party to obtain an opinion from a government agency charged with enforcing its local privacy laws?
- Short of requiring contracted parties to be subject to a legal, governmental or regulatory action, what other trigger would amount to a credible demonstration that a party is legally prevented from fully complying with applicable provisions of its ICANN contract regarding its WHOIS obligations.

1.3.4 General

The IAG welcomes community input as to whether its recommendation that there be an Alternative Trigger should be added to the Procedure.

1.5 Conclusions and Next Steps

The IAG aims to complete this section of the report following its review of public comments received on this Initial Report.

2. Objective and Next Steps

This Initial Report on of the Implementation Advisory Group to Review Existing ICANN Procedure for Handling WHOIS Conflicts with Privacy Laws was prepared as required by the IAG's [Statement of Work](#). The Initial Report will be posted for public comment for 40 days. The comments received will be analyzed by the IAG as part of its development of a Final Report to be considered by the GNSO Council for further action.

3. Background

3.1 Process Background

- In November 2005, the Generic Names Supporting Organization (GNSO) concluded a [policy development process \(PDP\) on WHOIS conflicts with privacy law](#) which recommended that “In order to facilitate reconciliation of any conflicts between local/national mandatory privacy laws or regulations and applicable provisions of the ICANN contract regarding the collection, display and distribution of personal data via the gTLD WHOIS service, ICANN should:
 - Develop and publicly document a procedure for dealing with the situation in which a registrar or registry can credibly demonstrate that it is legally prevented by local/national privacy laws or regulations from fully complying with applicable provisions of its ICANN contract regarding the collection, display and distribution of personal data via WHOIS.
 - Create goals for the procedure which include:
 - Ensuring that ICANN staff is informed of a conflict at the earliest appropriate juncture;
 - Resolving the conflict, if possible, in a manner conducive to ICANN's Mission, applicable Core Values, and the stability and uniformity of the WHOIS system;
 - Providing a mechanism for the recognition, if appropriate, in circumstances where the conflict cannot be otherwise resolved, of an exception to contractual obligations to those registries/registrars to which the specific conflict applies with regard to collection, display and distribution of personally identifiable data via WHOIS; and
 - Preserving sufficient flexibility for ICANN staff to respond to particular factual situations as they arise”.
- The ICANN Board adopted the recommendations in May 2006 and the final Procedure was made effective in January 2008.

3.2 Issue Background

- Given that the WHOIS Procedure has not been invoked and yet numerous concerns have arisen from contracted parties and the wider community, ICANN launched a review as provided for in Step Six of the Procedure, which calls for an annual review of the Procedure's effectiveness.
- The [review](#) was launched with the publication of a paper for public comment on 22 May 2014. The paper outlined the Procedure's steps and invited public comments on a series of questions. Following analysis of all public comments received, the IAG was formed to consider possible changes to how the Procedure is invoked and used. Several common themes could be discerned from among some of the suggestions in the public comments, which may allow for changes to implementation of the Procedure in line with the underlying policy.

4. Approach taken by the Working Group

4.1 Working Methodology

- The IAG began its deliberations on 7 January 2015. It conducted its work primarily through [monthly conference calls](#), in addition to e-mail exchanges on its mailing list. All of the IAG's meetings are documented on its [wiki homepage](#), including its mailing list, draft documents, and background materials.
- The IAG originally intended to address the issues in the order in which they appeared in the [Charter](#). Those issues are as follows:
 - Process: Should the Procedure be revised to allow for invocation prior to contracting?
 - If adopted, how would that alter the contracting process?
 - What parties would be most appropriate to include at this early stage of the Procedure?
 - Trigger: What triggers would be appropriate for invoking the Procedure?
 - Would evidence from a data protection authority that the contract is in conflict with national laws be sufficient to trigger the Procedure? If so, how would ICANN define which data protection authority is an acceptable authority? Would the authority have to be a nationally representative body? Should a regional body's opinion carry the same weight as a national or local authority?
 - Similarly, would an official opinion from a government agency provide enough evidence? If so, which agencies would be most appropriate? Would it have to be an agency tasked with data protection? What about a consumer trust bureau or treasury department that includes consumer protections in its mandate? Or would a foreign ministry provide the best source of information? Which bodies would be considered authoritative enough to provide a creditable opinion?
 - Would evidence of a conflict from ICANN-provided analysis provide sufficient information to invoke the Procedure? What type of evidence should this analysis cite?
 - If the Procedure allowed for a written opinion from a nationally recognized law firm to provide sufficient evidence for a trigger? What types of firms could be considered nationally recognized? Should it be accredited or made to prove its

- competency? If so, how? What if ICANN receives contradictory opinions from two firms? How is it to determine the more valid argument?
- Public comment: How should public comments be incorporated into the Procedure?
 - What role should comments have in ICANN's decision-making process?
 - What length of public comment period is appropriate to ensure that the Procedure is completed in a timely fashion?
 - How should comments be analyzed?
 - Should public comments be treated as a safeguard in case a decision is flawed?
- On the IAG's first conference call it became apparent that the key issue was what trigger(s) would be appropriate for invoking the Procedure. The IAG spent most of that call and all of the five subsequent calls debating potential triggers.

4.2 Members of the IAG

The members of the IAG and their Statements of Interest can be found at

<https://community.icann.org/display/WNLCI/IAG-WHOIS+Conflicts+Team+Composition+and+SOI%27s>.

5. Deliberations of the IAG

This Section provides an overview of the deliberations of the IAG. The points outlined below are meant to provide the reader with relevant background information on the IAG's deliberations and processes, and should not be read as either final recommendations or as representing the entirety of the deliberations of the IAG. The IAG will not finalize its recommendations to the GNSO Council until it has conducted a thorough review of the comments received during the public comment period on this Initial Report.

5.1 Scope of Work

Per its Mission and Scope, the IAG was tasked to review a list of topics and questions, as part of its work to develop recommendations relating to the WHOIS Conflicts with National Law Procedure.

5.2 Main Issues

At a minimum, the IAG was charged with considering the following issues that were highlighted in the recent [Report of Public Comments](#) on this topic. Those issues include:

- Process: Should the Procedure be revised to allow for invocation prior to contracting?
 - If adopted, how would that alter the contracting process?
 - What parties would be most appropriate to include at this early stage of the Procedure?
- Trigger: What triggers would be appropriate for invoking the Procedure?
 - Would evidence from a data protection authority that the contract is in conflict with national laws be sufficient to trigger the Procedure? If so, how would ICANN define which data protection authority is an acceptable authority? Would the authority have to be a nationally representative body? Should a regional body's opinion carry the same weight as a national or local authority?
 - Similarly, would an official opinion from a government agency provide enough

evidence? If so, which agencies would be most appropriate? Would it have to be an agency tasked with data protection? What about a consumer trust bureau or treasury department that includes consumer protections in its mandate? Or would a foreign ministry provide the best source of information? Which bodies would be considered authoritative enough to provide a creditable opinion?

- Would evidence of a conflict from ICANN-provided analysis provide sufficient information to invoke the Procedure? What type of evidence should this analysis cite?
- If the Procedure allowed for a written opinion from a nationally recognized law firm to provide sufficient evidence for a trigger? What types of firms could be considered nationally recognized? Should it be accredited or made to prove its competency? If so, how? What if ICANN receives contradictory opinions from two firms? How is it to determine the more valid argument?
- Public comment: How should public comments be incorporated into the Procedure?
 - What role should comments have in ICANN's decision-making process?
 - What length of public comment period is appropriate to ensure that the Procedure is completed in a timely fashion?
 - How should comments be analyzed?
 - Should public comments be treated as a safeguard in case a decision is flawed?

As noted above, the IAG spent the vast majority of its meetings discussing questions related to the appropriate triggers for invoking the Procedure. Early in its deliberations, the IAG seemed to support allowing for invocation of the Procedure in advance of contracting, regardless of the trigger mechanism. Throughout the discussions, there also appeared to be general support to subject requests to invoke the Procedure to ICANN public comment processes.

6. IAG Preliminary Recommendations

6.1 Preliminary Recommendations

The IAG was tasked with providing the GNSO Council suggestions on how to improve the current WHOIS Conflicts Procedure. The following are the preliminary recommendations from the IAG as well as a proposal for which there is currently no consensus.

Consensus - Recommendation for Alternative Trigger

- Currently, the [Procedure](#) recognizes only one trigger for purposes of seeking relief from the conflict of a WHOIS obligation and national privacy law. The registry/registrar must have received “notification of an investigation, litigation, regulatory proceeding or other government or civil action that might affect its compliance.”
- Under the “Alternative Trigger” proposal, a contracted party would not have to wait to receive notification of a proceeding against it. Rather, it could seek a written statement from a government agency indicating that a particular WHOIS obligation conflicts with national law and then submit that statement to ICANN. The agency statement would have to identify the inconsistency agency has found between national law and contractual obligations. In addition, the agency would have to certify that it has the legal authority to enforce the national law which it has found to be inconsistent with contractual obligations, and that it has jurisdiction over the contracted party for the purposes of such enforcement. The contracted party’s submission of the government statement would be posted for public comment and the relevant GAC member (if any) would be solicited for comment as well.

No Consensus - Written Legal Opinion Trigger

- A number of IAG members supported the addition of a trigger consisting of a written legal opinion from a nationally recognized law firm. The firm’s opinion must state that national laws or statutes in the country of incorporation of a contracted part will affect its compliance with the provisions of the Registrar Accreditation Agreement or other contractual agreement with ICANN dealing with the collection, display or distribution of personally identifiable data via WHOIS.
- Such a trigger would be similar to a provision in the [2013 RAA](#)’s Data Retention Specification (DRS) by which registrars may request a waiver from compliance with specific terms and conditions of the DRS.

- Opponents to this trigger believe that a law firm opinion does not credibly demonstrate that a contracted party is legally prevented by local law to comply with its WHOIS obligations. These opponents note that law firms do not enforce local law and different firms in the same jurisdiction may present conflicting opinions.
- Contracted parties state that it is unreasonable to make them wait until they receive official notification of a proceeding against them before they can trigger the procedure. Some also expressed the concern that government officials often may not agree to provide an advisory opinion (as called for in the consensus recommendation above) and support a procedure that they can invoke proactively before they are subject to a legal or regulatory action.

Alternative Trigger for Discussion – Contracted Party Request:

- If a registry or registrar proposes to limit its Whois obligations for some or all of its registrants it would need to present ICANN with:
 - A request describing the legal conflict and why it's impossible to find a legal alternative including registrant consent or privacy/proxy services
 - Written support by all other affected registries and/or registrars or justification for why they are the only affected party
 - Written support/approval from a relevant governmental privacy agency (if one exists) highly recommended
 - Written support or non-objection to the request from local law enforcement and/or GAC
- ICANN's investigation of the grounds for the request would include but not be limited to seeking input from the GAC, law enforcement and other interested parties; posting the request for 45 days to allow parties to file objections and requiring resolution of any objections. ICANN may also seek outside expert advice to help inform a final decision.

7. Conclusions & Next Steps

The IAG will complete the next phase of its work and develop its recommendations in a Final Report to be sent to the GNSO Council for review following its analysis of public comments received on this Initial Report.

8. Appendix 1

Proposed Alternative Trigger
(absent a “Whois Proceeding”)

Step One: Notification

Contracted party presents to ICANN a written statement from agency:

- (1) Specifying the facts before it, i.e.,
 - (a) the specific contracted party in question (registrar or registry)
 - (b) the applicable terms of service/registration agreements agency has reviewed
 - (c) the applicable provisions of the ICANN contract in question
 - (d) the applicable law it has analyzed
- (2) Identifying and analyzing the inconsistency agency has found between national law and contractual obligations, citing specific provisions of each
- (3) Certifying that agency has the legal authority to enforce the national law which it has found to be inconsistent with contractual obligations, and that it has jurisdiction over the contracted party for the purposes of such enforcement

Step Two: Consultation

In cases to which the Alternative Trigger applies, the Consultation Step includes a public consultation in which all interested parties can review the written statement submitted in the Notification Step and to comment on all aspects of it.

In such cases, ICANN would also consult with the GAC representative (if any) from the country in question, pursuant to section 2.1.2 of the procedure.