

WHOIS and national law conflicts IAG

Background

ICANN published its [Call for Volunteers for the Implementation Advisory Group to Review Existing ICANN Procedure for Handling WHOIS Conflicts with Privacy Laws](#) on 14 October 2014. The IAG will work with ICANN staff on reviewing the current steps of the Procedure and identifying possible changes to the procedure to facilitate resolution of issues where WHOIS requirements conflict with applicable laws. The IAG is expected to explore whether any of the Procedure's elements ought to be amended in order to strike this balance. Any recommended changes made will need to be in line with the Procedure's underlying policy, which was [adopted by the GNSO Council in 2005](#). As a result, recommended changes to the implementation of the procedure, if any, will be shared with the GNSO Council to ensure that these do not conflict with the intent of the original policy recommendations.

Draft Statement of Work

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”.[\[1\]](#)

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.^[2] The paper outlined the Procedure's steps and invited public comments on a series of questions. The body of public comment was analyzed by ICANN staff, and the proposed next step is the formation of an IAG to consider changes to how the Procedure is enacted and used. ICANN staff found common themes 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.

The IAG's recommendation will then be shared with the GNSO Council to determine the next steps.

Mission and Scope

The IAG on the WHOIS National Law Conflicts Procedure is tasked with providing the GNSO Council suggestions on how to improve the current Procedure. The IAG's mission is to ~~make the~~ identify any problems with the Procedure and suggest any improvements that may be necessary to improve more accessible to contracted parties. ~~Considering that, to date, no party has invoked the Procedure, the IAG's recommended changes should work toward amending the Procedure in line with the current GNSO policy to provide a more useful tool.~~

The IAG's mission and scope will focus on whether to recommend changes to the Procedure and not ICANN's contractual requirements. Any recommendations made by the IAG will be forwarded to the GNSO Council to determine whether implementation of the Procedure ought to be changed.

As part of its deliberations, the IAG should, at a minimum, consider 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?
 - Support for addressing triggers first rather than process (Ashley Heineman, Steve Metalitz);
 - Michele Neylon disagrees – when to seek waiver rather than how is most important for a registrar; ridiculous to require people to sign contract that's illegal.
 - Seth Reiss – when is encompassed in the trigger.
 - Bradley Silver: doesn't matter what order we address these; process will come up naturally; ok discussing process first so long as it is discussed again after discussion of trigger.
 - Moderator proposes discussing trigger first and no one objects.

- 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?
 - Michele Neylon: existing trigger is ridiculous. Art. 29 and EU letters show they have issues with current WHOIS obligations; current policy is flawed.
 - Steve Metalitz: appropriate to look at what trigger is now. Under current Procedure, trigger could be litigation, investigation, regulatory proceeding, other government or civil action; not just litigation. Some DPAs have law enforcement authority, Art. 29 Group does not. Current trigger is fairly broad.
- 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?
 - Steve Metalitz: These are the right questions. Communication from DPA to registrar could take various forms. If from DPA that has enforcement authority, that would meet current trigger. To determine whether DPA is acceptable authority, ICANN could check with GAC.
 - Ashley Heineman: ICANN should seek GAC advice on what constitutes legitimate authority and needs to verify that letter is legitimate.
 - Steve: current process requires ICANN to go to the government and ask whether government authority is the right one. Might be worth clarifying this part of the procedure.
 - Moderator: is it sufficient for DPA to provide ICANN with opinion or does it have to have an action against it?
 - Michele: trigger requirement of ongoing proceeding is too far. If DPA writes opinion, it should be enough.
 - Moderator: does anyone object to modifying procedure based on letter from DPA?
 - Metalitz: letter could be fine, covered by current trigger, tied to named registrar.
 - Moderator: what if not tied to registrar?
 - Steve Metalitz: Doesn't see a problem if registrar sends in letter.
 - Michele: see Luc's chat. Misunderstanding about how laws enacted in EU. Not true that there's a big difference between EC and Irish DPA. If Irish DPA says clause is in conflict, should apply to all Irish registrars.
 - Moderator: need to figure out how to determine who is legitimate; maybe should be sent to GAC; maybe group can come up with criteria; can legitimate DPA give blanket opinion or must it be tied to particular operator.
 - Michele: current process for waiver from data retention requirements is horrendous and quite broken.
 - ⊖ Steve: this is separate process; disagree with idea that people haven't

invoked this process b/c of data retention process issues; we think data retention process has been very unsuccessful as shown in our public comments.

- 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?
 - Michele: need idea of agencies that would be relevant; DPAs or those responsible for data privacy authority at national or supernational level.
 - Moderator: who makes determination?
 - Michele: can't ask GAC about non-GAC member. If GAC member is there, that's ok.
 - Bradley: can't have ICANN determining whether agency is appropriate; highlights need for process against operator.
 - ⊖▪ Steve: right question is what are criteria? Go back to policy – are you legally prevented from complying? If there's a GAC member, then go to them. Have to ask right question: is this the agency that has authority to enforce privacy laws and regulations that would prevent the operator from complying.
- Would evidence of a conflict from ICANN-provided analysis provide sufficient information to invoke the Procedure? What type of evidence should this analysis cite?
 - Bradley Silver: does not support ICANN-provided analysis.
 - ⊖▪ Michele Neylon: Tepid support.
- 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?
 - Michele Neylon: This is important. Many DPAs won't give advisory opinions. Need to be able to go to law firms to demonstrate conflict. Don't understand requirement for "nationally recognized." If contradictory opinion, take it to the GAC perhaps.
 - Steve Metalitz: letters from nationally recognized law firms fall short in data retention; also inevitable to have law firms issue conflicting opinions; govt agency will have consistent views. This should not be an appropriate trigger.
 - ⊖—ICANN legal: we've had conflicting opinions and struggle with figuring out what is right thing to do.

Summing up: pretty big divide over whether additional triggers are appropriate.

- Some felt little or no change needed to triggers listed in existing Procedure (Steve Metalitz, Bradley Silver); others felt existing Procedure wholly inadequate (Michele

Neylon; Luc Seufer)

- General agreement on validity of opinion from legitimate authority. Questions remain on:
 - How to determine whether government agency is the legitimate authority, especially if government is not a GAC member?
 - Can the authority simply write ICANN with its opinion or must it be solicited by an operator?
 - Would opinion apply to all operators in the authority's jurisdiction or only to petitioning operator?
- No consensus on ICANN-provided analysis as trigger.
- No consensus on nationally recognized law firm as trigger.

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- **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?