

## **WHOIS Conflicts with Local Law Procedure – Status Overview**

### Original Policy Recommendations:

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 Procedure Implementing the Policy:

The Final Procedure which is the implementation of the policy outlined above took effect in January 2008<sup>1</sup>. The six-step procedure outlines how ICANN will respond to a situation where a registrar/registry indicates that it is legally prevented by local/national privacy laws or regulations from complying with the provisions of its ICANN contract regarding the collection, display and distribution of personal data via WHOIS. The procedure is applied by ICANN staff once triggered. While it includes possible actions for the affected gTLD registry/registrar, this procedure does not impose any new obligations on registries/registrars or third parties. It aims to inform registries/registrars and other parties of the steps that will be taken when a possible conflict between other legal obligations and the ICANN contractual requirements regarding WHOIS is reported to ICANN.

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<sup>1</sup> The full text of the Procedure can be viewed at <https://www.icann.org/resources/pages/whois-privacy-conflicts-procedure-2008-01-17-en>.

### The Review:

Although to date no registrar or registry operator has formally invoked the Procedure, public authorities as well as registrars and registry operators have raised concerns regarding potential conflicts between Whois contractual obligations and local law. In 2014, ICANN launched a review as provided for in Step Six of the Procedure<sup>2</sup>, 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, an Implementation Advisory Group (IAG) comprising community members was formed to consider the need for changes to how the Procedure is invoked and used. The IAG's recommendations would be submitted to the GNSO Council to review whether or not they are consistent with underlying policy.

Note that the role of an Implementation Advisory Group is distinct from that of an Implementation Review Team. The concept of an Implementation Advisory Group has been used before to provide input to ICANN on the implementation of policy recommendations after these had been in effect. In contrast, an Implementation Review Team works with staff on a proposed implementation plan before it becomes effective. There are currently no formal rules around the use of an IAG nor the status of its output and how this is expected to be considered by the GNSO Council. For the mission and scope of this IAG, see <https://community.icann.org/x/SCvxAg>.

### IAG Final Report

The IAG spent the majority of its deliberations on the second issue, "Trigger: What triggers would be appropriate for invoking the Procedure." The IAG reached preliminary agreement on the following 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

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<sup>2</sup> "6.1 With substantial input from the relevant registries or registrars, together with all constituencies, ICANN will review the effectiveness of the process annually."

Whois obligation conflicts with national law and then submit that statement to ICANN.

The IAG also discussed two other triggers (written legal opinion and contracted party request trigger) which are also outlined in the Final Report for which there was not majority support within the WG.

What is being asked of the Council?

The Council is being asked to confirm whether or not the proposed modification to the procedure is consistent with the intent of the original policy recommendations, in line with the scope of the task of the IAG.

Potential Scenarios and Consequences

Action	Consequence	Possible mitigation of concerns expressed
Council confirms that the proposed modification that has preliminary agreement is consistent with the intent of the original policy recommendations.	The procedure is updated with the alternative trigger.	Along with this confirmation, staff could be asked to review if this alternative trigger addresses the concerns previously expressed as well as confirm with government agencies charged with enforcing data privacy laws that they would be in a position to act as described in the procedure.
Council confirms that the proposed modification that has preliminary agreement is not consistent with the intent of the original recommendations.	The procedure is not updated and remains as is.	The Council should specify why it is of the view that the proposed modification is not consistent. Furthermore the Council could consider whether more work is required on the proposed modification to ensure that it is consistent with the intent of the policy recommendations (for example by reconstituting the IAG or forming a new group) or whether the original policy recommendations are in need of review.
Council confirms that the proposed modification that has preliminary agreement is consistent with the intent of the original policy recommendations. For the proposed modifications that did not achieve majority support, Council requests that staff works with the directly	The procedure is updated with the alternative trigger, but following the outcome of the staff review and consultation further updates may be made at a later date.	The GNSO Council is not limited to considering only the proposed modification that has preliminary agreement. Due consideration should be given to the reasons why other proposed modifications did not achieve preliminary agreement. Also, the

<p>affected and involved parties to determine which of the different triggers outlined in the IAG Final Report (or a combination thereof) would provide an appropriate balance between the different perspectives and concerns that have been expressed as a result of the Council's review and discussion. The result of this process would need to be reviewed by the Council and similarly a confirmation that the proposed modification is not in conflict with the intent of the original policy recommendations would be needed.</p>		<p>IAG's scope of work meant it did not undertake any further work to determine whether the proposed modification that has preliminary agreement is implementable which some have expressed concerns about. However, at a minimum, IAG members should be invited to be part of this consultation process in addition to other affected parties to ensure their input is considered.</p>
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