

## **Preamble:**

Task Force 2 spent over a year collecting data and working on the conflict between a registrar/registry's legal obligations under privacy laws and their contractual obligations to ICANN. Its report included the statement: "The Task Force believes that there is an ongoing risk of conflict between a registrar's or registry's legal obligations under local privacy laws and their contractual obligations to ICANN. *TF2 Report, Section 2.3*, <http://www.gnso.icann.org/issues/whois-privacy/Whois-tf2-preliminary.html>.

By vote of the Task Force, now merged, on May 24, 2005, the work of Task Force 2 is hereby divided into a recommendation for "consensus policy" accompanied by "well-developed advice for a procedure."

## **I. Task Force Policy for WHOIS Conflicts with Privacy Law**

### **CONSENSUS POLICY RECOMMENDATION**

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 Whois, ICANN should:

1. 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.
2. Create goals for the procedure which include:
  - a. Ensuring that ICANN staff is informed of a conflict at the earliest appropriate juncture;
  - b. Resolving the conflict, if possible, in a manner conducive to stability and uniformity of the Whois system;
  - c. Providing a mechanism for the recognition, in appropriate circumstances where the conflict cannot be otherwise resolved, of an exception to contractual obligations for all registrars with regard to collection, display and distribution of personally identifiable data via Whois; and
  - d. Preserving sufficient flexibility for ICANN staff to respond to particular factual situations as they arise.

## II. Guidance on Procedure

### WELL-DEVELOPED ADVICE ON A PROCEDURE FOR HANDLING WHOIS CONFLICTS WITH PRIVACY LAW

Based on extensive research and negotiation among Task Force 2 together with the merged Task Force and ICANN staff, the following procedure for handling the policy recommendation set out in Section I above is set out as a Recommended Step-by-Step Procedure for Resolution of WHOIS Conflicts with Privacy Law. We encourage ICANN staff to use this Recommended Procedure as a starting point for developing the procedure called for in the Consensus Policy Recommendation above.

#### *Step One: Notification of Initiation of Action*

Once receiving notification of an investigation, litigation, regulatory proceeding or other government or civil action that might affect its compliance with the provisions of the RAA or other contractual agreement with ICANN dealing with the collection, display or distribution of personally identifiable data via Whois (“Whois Proceeding”), a Registrar/ Registry must within thirty (30) days provide ICANN’s General Counsel (or other staff member as designated by ICANN)<sup>1</sup> with the following information:

- Summary description of the nature and status of the action (e.g., inquiry, investigation, litigation, threat of sanctions, etc.)
- Contact information for the responsible official of the registrar/registry for resolving the problem.
- Contact information for the responsible territorial government agency or other claimant and a statement from the registrar/registry authorizing ICANN to communicate with those officials or claimants on the matter. If the registrar/registry is prevented by applicable law from granting such authorization, the notification should document this.
- The text of the applicable law or regulations upon which the local government or other claimant is basing its action or investigation, if such information has been indicated by the government or other claimant.

Meeting the notification requirement permits Registrars/Registries to participate in investigations and respond to court orders, regulations, or enforcement authorities in a manner and course deemed best by their counsel.

Depending on the specific circumstances of the Whois Proceeding, the Registrar/Registry may request that ICANN keep all correspondence between the parties confidential pending the outcome of the Whois Proceeding. It is

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<sup>1</sup> For simplicity, this designated official is referred to hereafter as the General Counsel, with the understanding that the functions described may be allocated differently among the ICANN staff.

recommended that ICANN respond favorably to such requests to the extent that they can be accommodated with other legal responsibilities and basic principles of transparency applicable to ICANN operations.

### *Step Two: Consultation*

Unless impractical under the circumstances, we recommend that the ICANN General Counsel, upon receipt and review of the notification and, where appropriate, dialogue with the registrar/registry, consider beginning a process of consultation with the local/national enforcement authorities or other claimant together with the registrar/registry. The goal of the consultation process should be to seek to resolve the problem in a manner that preserves the ability of the registrar/registry to comply with its contractual obligations to the greatest extent possible.

The Registrar should attempt to identify a solution that allows the registrar to meet the requirements of both the local law and ICANN obligations. The General Counsel can assist in advising the registrar on whether the proposed solution meets the ICANN obligations.

If the Whois proceeding ends without requiring any changes and/or the required changes in registrar/registry practice do not, in the opinion of the General Counsel, constitute a deviation from the R.A.A. or other contractual obligation, then the General Counsel and the registrar/registry need to take no further action.

If the registrar/registry is required by local law enforcement authorities or a court to make changes in its practices affecting compliance with Whois-related contractual obligations before any consultation process can occur, the registrar/registry shall promptly notify the General Counsel of the changes made and the law/regulation upon which the action was based. The Registrar/Registry may request that ICANN keep all correspondence between the parties confidential pending the outcome of the Whois Proceeding. It is recommended that ICANN respond favorably to such requests to the extent that they can be accommodated with other legal responsibilities and basic principles of transparency applicable to ICANN operations.

### *Step Three: General Counsel analysis and recommendation*

If the local/national government requires changes (whether before, during or after the consultation process described above) that, in the opinion of the General Counsel, prevent full compliance with contractual WHOIS obligations, ICANN should consider the following alternative to the normal enforcement procedure. Under this alternative, ICANN would refrain, on a provisional basis, from taking enforcement action against the registrar/registry for non-compliance, while the

General Counsel prepares a report and recommendation and submits it to the ICANN Board for a decision. Such a report may contain:

- i. A summary of the law or regulation involved in the conflict;
- ii. Specification of the part of the registry or registrar's contractual WHOIS obligations with which full compliance is being prevented;
- iii. Summary of the consultation process if any under step two; and
- iv. Recommendation of how the issue should be resolved, which may include whether ICANN should provide an exception for all registrars/registries from one or more identified WHOIS contractual provisions. The report should include a detailed justification of its recommendation, including the anticipated impact on the operational stability, reliability, security, or global interoperability of the Internet's unique identifier systems if the recommendation were to be approved or denied .

The registrar/registry should be provided a copy of the report and provided a reasonable opportunity to comment on it to the Board. The Registrar/Registry may request that ICANN keep such report confidential prior to any resolution of the Board. It is recommended that ICANN respond favorably to such requests to the extent that they can be accommodated with other legal responsibilities and basic principles of transparency applicable to ICANN operations.

#### *Step Four: Resolution*

Keeping in the mind the anticipated impact on the operational stability, reliability, security, or global interoperability of the Internet's unique identifier systems, the Board should consider and take appropriate action on the recommendations contained in the General Counsel's report as soon as practicable. Actions could include, but are not limited to:

- Approving or rejecting the report's recommendations, with or without modifications;
- Scheduling a public comment period on the report; or
- Referring the report to GNSO for its review and comment by a date certain.

#### *Step Five: Public Notice*

The Board's resolution of the issue, together with the General Counsel's report, should ordinarily be made public, along with the reasons for it, and be archived on a public website (along with other related materials) for future research. Prior to release of such information to the public, the Registry/Registrar may request that certain information (including, but not limited to, communications between the Registry/Registrar and ICANN, or other privileged/confidential information) be redacted from the public notice. In the event that such redactions make it difficult to convey to the public the nature of the actions being taken by the Registry/Registrar, the General Counsel should work with the Registry/Registrar on an appropriate notice to the public describing the actions being taken and the justification for such actions.

Unless the Board decides otherwise, if the result of its resolution of the issue is that data elements in the registrar's Whois output will be removed or made less accessible, ICANN should issue an appropriate notice to the public of the resolution and of the reasons for ICANN's forbearance from enforcement of full compliance with the contractual provision in question.