

Final 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 final Report of the Implementation Advisory Group to Review Existing ICANN Procedure for Handling Whois Conflicts with Privacy Laws, prepared by ICANN staff for submission to the GNSO Council.

SUMMARY

This report is submitted to the GNSO Council by the Implementation Advisory Group to Review Existing ICANN Procedure for Handling Whois Conflicts with Privacy Laws. The IAG recommends that the GNSO Council approve a modification to the Whois Conflicts Procedure as described below.

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I. 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 Final 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 6.

1.3.1 Summary of the IAG's agreed preliminary conclusions

The IAG 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 was not majority support 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.

Contracted Party Request Trigger

- Some IAG members supported a trigger under which in response to a request from a contracted party, ICANN would investigate whether the request for relief is adequate for triggering the procedure. The requesting party 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 (mandatory)
 - Written support by all other registries and/or registrars potentially affected by the legal conflict or justification for why they are the only affected party (mandatory)
 - Written support/approval from a relevant governmental privacy agency (if one exists) (highly recommended but not mandatory)
 - Written support or non-objection to the request from the relevant GAC member or relevant government agency if the jurisdiction does not have a GAC member (mandatory)

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.

Public comment was specifically invited on the following questions:

1. Should the Procedure include a trigger consisting solely of a nationally recognized law firm opinion? If so, why, and if not, why not?
2. 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?
3. How feasible is it for a contracted party to obtain an opinion from a government agency charged with enforcing its local privacy laws? What role if any should ICANN play in investigating the basis for a trigger?
4. Is it appropriate to trust ICANN to investigate whether a request for relief satisfies the grounds to trigger the procedure?
5. Short of requiring contracted parties to be subject to a legal, governmental or regulatory action, what other trigger(s) 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?

1.3.3 General

The IAG also welcomed community input as to whether its recommendation to add to the Procedure an Alternative Trigger (in the absence of a Whois proceeding) should be adopted in its final report. The IAG also welcomed comment on the other triggers that did not garner majority support within the working group.

1.4 Report of Public Comments

ICANN staff published the [Report of Public Comments](#) on the IAG's [Initial Report](#) on 21 January 2016.

1.5 Conclusions and Next Steps

Following the review and analysis of public comments received on this report, the IAG recommends that the GNSO Council approve one change to the existing procedure, namely the addition of the "Alternative Trigger." With this change, a contracted party 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. The party would then be entitled to seek an exemption from a conflicting Whois obligation.

II. Objective and Next Steps

This Final 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 IAG now submits the Final Report to be considered by the GNSO Council for further action.

III. Background

Current Policy and 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.

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.

IV. 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 credible 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>.

V. 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.

VI. IAG Preliminary Recommendation

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.

Majority support - 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. **See Appendix 1.**

Some support - 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. **See Appendix 2.**

Some support – 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 (mandatory)
 - Written support by all other affected registries and/or registrars or justification for why they are the only affected party (mandatory)
 - Written support/approval from a competent data protection agency with enforcement authority (if one exists) (highly recommended but not mandatory)
 - Written support or non-objection to the request from the relevant GAC member or relevant government agency if the jurisdiction does not have a GAC member
- 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.

VII. Public Comments on the IAG Preliminary Report

The Comments Forum on the IAG's [Initial Report](#) opened on 5 October 2015 and closed on 17 November 2015. The Report of [Public Comments](#) was published on 21 January 2016.

Ten comments were submitted and were generally consistent with the divided views of the Implementation Advisory Group members. Among the comments submitted, five were from civil society, two represented intellectual property rights holders, two represented business interests, and one was filed by the Registry Stakeholder Group. No comments were submitted from the registrar community although they were represented on the IAG.

Consistent with the IAG's Initial Report, there appeared to be consensus support among the commenters for one recommendation only. There were sharply diverging views on most of the other issues raised in the comments. The comments do not appear to support any significant changes to the current implementation of the Whois conflicts with privacy law policy recommendations.

The IAG's mandate was to review the Procedure applicable to 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 the gTLD Whois service. Consistent with the Initial Report, the comments focused primarily on whether and how to supplement the existing triggers for invoking the Whois Conflicts Procedure.

Some comments related to matters beyond the IAG's Scope and Mission. These comments were consistent with the Minority Statements in Appendix 4 of the IAG's Initial Report. Of course, the GNSO Council may review these statements in order to determine whether these statements warrant other actions by the GNSO Council that may fall outside the scope of this specific effort but which are in scope of other GNSO efforts or actions by the GNSO Council.

VIII. IAG Final Recommendation

Based on the the IAG's deliberations and the public comment received on the Initial Report, the IAG recommends that the procedure include the "Alternative Trigger" proposal. With this change, 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. A redlined version of the Procedure incorporating this change can be found in **Appendix 3**

IX. Conclusions & Next Steps

The IAG submits this Final Report including its recommendation to the GNSO Council for its consideration. The GNSO Council is now expected to review the IAG Final Report and confirm whether or not it supports to modification of the Procedure as proposed. Consistent with the IAG's [Mission and Scope](#), the proposed change modifies the Procedure but does not affect the underlying policy recommendations. If the GNSO Council approves the recommendation, the procedure will be amended accordingly.