

# Final Report on the Implementation Advisory Group Review of Existing ICANN Procedure for Handling Whois Conflicts with Privacy Laws

## Cover Memo to GNSO Council

### I. Executive Summary

In November 2005, the Generic Names Supporting Organization (GNSO) concluded a [policy development process \(PDP\) on Whois conflicts with privacy law](#), which recommended the creation of a procedure to address conflicts between a contracted party's Whois obligations and local/national privacy laws or regulations. A contracted party that credibly demonstrates that it is legally prevented from complying with its Whois obligations can invoke the procedure, which became effective in January 2008. The procedure defines a credible demonstration as one in which the contracted party has received "notification of an investigation, litigation, regulatory proceeding or other government or civil action that might affect its compliance." To date, the procedure has never been invoked. ICANN launched a review of the procedure in May 2014. Following a [Call for Volunteers](#) addressed to all interested parties, an Implementation Advisory Group (IAG) was formed to review the implementation of the policy recommendations and began its work in January 2015. The IAG devoted most of its time discussing whether additional triggers to invoke the procedure should be incorporated and if so how to ensure that they remain consistent with the existing policy. The IAG now submits its final report and recommendation to the GNSO Council.

### II. Background – process summary, public comment proposal

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 of Directors 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 had 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 had not been invoked, 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 potential need for changes to how the Procedure is invoked and used.

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. 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 outlined in its Mission and Scope, "Trigger: What triggers would be appropriate for invoking the Procedure?".

### III. [Public Comment 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.

#### IV. Recommendation

The IAG recommends a modification to the existing Whois Conflicts Procedure. The modification would allow a party to trigger the procedure by obtaining 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 submitting that statement to ICANN. A redlined version of the Procedure incorporating this change can be found in **Appendix 1**.

#### V. Conclusions & Next Steps

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.