

ICANN | GNSO

Generic Names Supporting Organization

IAG Name:	ICANN Procedure For Handling WHOIS Conflicts with Privacy Law Implementation Advisory Group (WHOIS Procedure IAG)	
Section I: Working Group Identification		
Chartering Organization(s):	Generic Names Supporting Organization (GNSO) Council	
Charter Approval Date:	<Enter Approval Date>	
Name of IAG Chair/Co-Chairs:	<Enter Appointed Chair>	
Name(s) of Appointed Liaison(s):	<Enter Liaison>	
IAG Workspace URL:	<Enter Active Project URL from GNSO Site>	
IAG Mailing List:	<Enter Mailman archive link>	
GNSO Council Resolution:	Title:	<Enter Resolution Title>
	Ref # & Link:	<Enter Resolution link>
Important Document Links:	<ul style="list-style-type: none">• https://whois.icann.org/en/revised-icann-procedure-handling-whois-conflicts-privacy-law• https://www.icann.org/public-comments/whois-privacy-law-2017-05-03-en• https://www.icann.org/en/system/files/files/report-comments-whois-privacy-law-28jul17-en.pdf• https://gns0.icann.org/en/correspondence/atallah-to-bladel-et-al-01aug17-en.pdf• https://gns0.icann.org/en/council/resolutions#201702• https://gns0.icann.org/en/drafts/iag-review-whois-conflicts-procedure-26may16-en.pdf	
Section II: Mission, Purpose, and Deliverables		
Mission & Scope:		

Background

ICANN-accredited registrars and gTLD registries have agreements in place with ICANN. It is either expressed or implied in those agreements that the contracted parties must comply with applicable laws and regulations.

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. The ICANN Board of Directors adopted the recommendations in May 2006 and the final procedure was made effective in January 2008. The only trigger available in the 2008 procedure was receipt of notification of an investigation, litigation, regulatory proceeding or other government or civil action that might affect a contracted party's compliance with WHOIS-related contractual obligations (WHOIS Proceeding).

As noted in the GNSO Operating Procedures, "Periodic assessment of PDP recommendations and policies is an important tool to guard against unexpected results or inefficient processes arising from GNSO policies". As called for in Step 6 of the ICANN Procedure For Handling WHOIS Conflicts with Privacy Law [<https://www.icann.org/resources/pages/whois-privacy-conflicts-procedure-2008-01-17-en>], "ICANN will review the effectiveness of the process annually".

ICANN launched a first 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. In its final report, the IAG recommended a modification to the existing WHOIS Conflicts Procedure whereby a party could 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, in addition to the existing trigger.

On 16 February 2017, the GNSO Council concluded that the modification proposed by the IAG conformed to the intent of the original policy recommendations and, as such, the GNSO Council confirmed its non-objection to the modification being implemented, which subsequently occurred. At the same time, the GNSO Council requested that ICANN staff, based on their experience of administering the modification, assess the practicality and feasibility of this new trigger in comparison to the existing trigger as well as the other triggers ("Contracted Party Request" and "Legal Opinion" trigger) discussed in the IAG Final Report.

ICANN staff subsequently opened a public comment forum to obtain community input on the effectiveness of the updated ICANN Procedure for Handling WHOIS Conflicts with Privacy Law (WHOIS Procedure). The [staff report](#) of public comments noted that "Almost all commenters expressed concern regarding the practicality and feasibility of getting the necessary documentation from the relevant government agency as part of the 'Alternative Trigger' in step one of the revised WHOIS Procedure, in the absence of a Whois Proceeding". Furthermore, it also observed that

“Respondents expressed mixed feelings about incorporating a third trigger to launch the procedure, such as the Contracted Party Request or the Legal Opinion trigger, into the revised Whois Procedure to mitigate issues related to obtaining statements from a governmental agency”. In addition, a number of other suggestions and comments were provided.

The results of the public comment forum were [communicated](#) to the GNSO Council on 1 August 2017 with the request for the GNSO Council to consider the path for proceeding with the review of the Procedure. The GNSO Council discussed the topic at its subsequent meetings and agreed during its meeting on 30 November 2017 to form a group that would review the input received during the public comment period and make recommendations on how to proceed next.

Mission and Scope

The ICANN Procedure For Handling WHOIS Conflicts with Privacy Law Implementation Advisory Group (WHOIS Procedure IAG) is tasked to provide the GNSO Council with recommendations on how to address the comments and input that have been received in response to the [public comment forum](#) on the Revised ICANN Procedure for Handling WHOIS Conflicts with Privacy Law: Process and Next Steps. Recommendations made to the GNSO Council should be limited to determining whether modifications to the Revised ICANN Procedure for Handling WHOIS Conflicts with Privacy Law are necessary to address concerns raised through the public comment forum, including, for example, comments made in relation to revising existing triggers, developing new triggers, and ICANN review and resolution timing issues, provided these are not inconsistent with the underlying policy recommendations.

In considering its recommendations, the WHOIS Procedure IAG is expected to review all the materials identified in the important document links section of this charter, but mainly focus on the feedback provided in response to the public comment forum. As such, the WHOIS Procedure IAG is not asked to redo the work of the previous IAG, but to review this issue in the context of the input that has been provided on the Revised ICANN Procedure for Handling WHOIS Conflicts with Privacy Law (which was revised on the recommendations of the previous IAG). Further, the WHOIS Procedure IAG is expected to provide a rationale (including data or other support) for recommendations based on an implementation impact analysis.

Objectives & Goals:

The WHOIS Procedure IAG shall set out its recommendations in a Preliminary Report, which shall be published for public comment, and a Final Report for submission to the GNSO Council.

Deliverables & Timeframes:

At the start of its work, the WHOIS Procedure IAG is expected to develop and submit to the GNSO Council a work plan that outlines the necessary steps and expected timing in order to achieve the milestones of publication of the Initial Report and Final Report.

If the WHOIS Procedure IAG provides any recommendations to modify the ICANN Procedure For Handling Whois Conflicts with Privacy Law, the IAG must include an implementation impact analysis and a set of metrics to measure the effectiveness of the implementation change, including source(s)

of baseline data for that purpose:

- Confirmation of original policy recommendations and goals, and consistency with those policy recommendations and goals
- Identification of metrics used to measure whether policy goals are achieved
- Identification of potential problems in attaining the data or developing the metrics
- A suggested timeframe in which the measures should be performed
- Define current state baselines of the policy implementation and define initial benchmarks that define success or failure
- Metrics may include but not limited to (Refer to the [Hints & Tips Page](#)):
 - ICANN Compliance data
 - Industry metric sources
 - Community input via public comment
 - Surveys or studies

Section III: Formation, Staffing, and Organization

Membership Criteria:

Participation in the WHOIS Procedure IAG is open to GNSO Stakeholder Group (SG) appointed Members, Participants and Observers. Members shall be appointed by the GNSO Stakeholder Groups in accordance with their own rules and procedures. Each Stakeholder Group shall appoint up to 3 Members.

In addition to the role that SG-appointed members have in relation to potential consensus calls or decisions (see below), they are expected to serve as a liaison between their respective SGs/Cs (as appropriate) and the IAG. Members must, if and when necessary, ensure that the SGs/Cs (as appropriate) are kept up to date on the progress and deliberations of the IAG as well as sharing any input from the SGs with the IAG.

In addition, the WHOIS Procedure IAG will be open to any interested person as a Participant. Participants may be from a GNSO Stakeholder Group or Constituency, or may be self-appointed and derive from within the ICANN or broader community. Participants will be able to actively participate in and attend all WHOIS Procedure IAG meetings. However, should there be a need for a consensus call or decision, such consensus call or decision will be limited to members appointed by the GNSO SGs, who may consult as appropriate with their respective SGs. By self-appointing, a Participant commits to abide to the charter of the WHOIS Procedure IAG.

Observers may join the WHOIS Procedure IAG and will be subscribed to the mailing list on a read-only basis (no posting rights). Observers are not allowed to attend the IAG meetings. However, should an Observer desire to change his/her status to participant, they may do so at any time.

A GNSO Council Liaison will be appointed by the GNSO Council to the WHOIS Procedure IAG at the same time as the charter is adopted.

Chair Selection

Unless a Chair has already been named by the GNSO Council, a Chair should be selected at the first meeting of the WHOIS Procedure IAG. Until that time, the GNSO Council's liaison may fulfill the role of interim Chair. The WHOIS Procedure IAG may elect to have Vice-Chairs. Under extraordinary circumstances, ICANN staff may be requested to perform administrative co-ordination of the IAG until such time as a Chair can be appointed. Once selected, the IAG Chair will need to be confirmed by the GNSO Council. The newly appointed Chair will act on a provisional basis until the GNSO Council has confirmed the appointment.

Group Formation, Dependencies, & Dissolution:

Each of the GNSO Stakeholder Groups shall appoint up to 3 members to the WHOIS Procedure IAG in accordance with their own rules and procedures. Staff support dedicated to this effort will be responsible for: collecting the names of the appointed members, circulating a call for volunteers (Participants and Observers) and for setting up the required tools for this effort (e.g. wiki, mailing list, adobe connect room). Staff support will work with the chair to schedule a first meeting of the WHOIS Procedure IAG.

IAG Group Roles, Functions, & Duties:

The ICANN Staff assigned to the WHOIS Procedure IAG will fully support the work of the Working Group as requested by the Chair including meeting support, document drafting, editing and distribution and other substantive contributions when deemed appropriate.

Staff assignments to the Working Group:

- [GNSO Policy Staff]/[GDD]

Statements of Interest (SOI) Guidelines:

Each member of the IAG is required to submit an SOI in accordance with Section 5 of the GNSO Operating Procedures.

Section IV: Rules of Engagement

Decision-Making Methodologies:

In developing its output, work plan and reports, the WHOIS Procedure IAG shall seek to act by consensus. The Chair may make a call for Consensus. If making such a call, the Chair should always make reasonable efforts to involve all Stakeholder Group appointed Members of the IAG. The Chair shall be responsible for designating each position as having one of the following designations:

- Full consensus - when no one in the group speaks against the recommendation in its last readings. This is also sometimes referred to as Unanimous Consensus.
- Consensus - a position where only a small minority disagrees, but most agree.

The recommended method for discovering the consensus level designation on recommendations should work as follows:

- i. After the group has discussed an issue long enough for all issues to have been raised, understood and discussed, the Chair should make an evaluation of the designation and publish it for the members of the group to review.
- ii. After the members of the group have discussed the Chair's estimation of designation, the Chair should reevaluate and publish an updated evaluation.

- iii. Steps (i) and (ii) should continue until the Chair makes an evaluation that is accepted by the members of the group.
- iv. In rare cases, a Chair may decide that the use of polls is reasonable. Some of the reasons for this might be:
 - A decision needs to be made within a time frame that does not allow for the natural process of iteration and settling on a designation to occur.
 - It becomes obvious after several iterations that it is impossible to arrive at a designation.

Care should be taken in using polls that they do not become votes. A liability with the use of polls lies in the fact that there are often disagreements about the meanings of the poll questions or of poll results.

Based upon the WHOIS Procedure IAG's needs, the Chair may direct that IAG members do not have to have their name explicitly associated with any Full Consensus or Consensus view/position. However, in all other cases and in those cases where a group member represents the minority viewpoint, their name must be explicitly linked, especially in those cases where polls were taken.

Consensus calls should always involve the SG-appointed members of the IAG and, for this reason, should take place on the designated mailing list to ensure that all SG-appointed IAG members have the opportunity to fully participate in the consensus process. It is the role of the Chair to designate which level of consensus has been reached and announce this designation to the IAG. Member(s) of the WHOIS Procedure IAG should be able to challenge the designation of the Chair as part of the IAG's discussions. However, if disagreement persists, members of the IAG may use the process set forth below to challenge the designation.

If several members (see Note 1 below) in the IAG disagree with the designation given to a position by the Chair or any other consensus call, they may follow these steps sequentially:

1. Send email to the Chair, copying the entire WHOIS Procedure IAG, explaining why the decision is believed to be in error.
2. If the Chair disagrees with the complainants, the Chair will forward the appeal to the GNSO Council Liaison. The Chair must explain his/her reasoning in the response to the complainants and in the submission to the liaison. If the liaison supports the Chair's position, the liaison will provide his/her response to the complainants. The liaison must explain his/her reasoning in the response. If the liaison disagrees with the Chair, the liaison will forward the appeal to the GNSO Council. Should the complainants disagree with the liaison's support of the Chair's determination, the complainants may appeal to the Chair of the GNSO or his/her designated representative. If the GNSO Council agrees with the complainants' position, the GNSO Council should recommend remedial action to the Chair.
3. In the event of any appeal, the GNSO Council will attach a statement of the appeal to the WHOIS Procedure IAG and/or Board report, if applicable. This statement should include all of the documentation from all steps in the appeals process and should include a statement from the GNSO Council (see Note 2 below).

Note 1: Any WHOIS Procedure IAG member may raise an issue for reconsideration; however, a formal appeal will require that a single member demonstrates a sufficient amount of support before a formal appeal process can be invoked. In those cases where a single IAG member is seeking reconsideration, the member will advise the Chair and/or Liaison of their issue and the Chair and/or Liaison will work with the dissenting member to investigate the issue and to determine if there is sufficient support for the reconsideration to initial a formal appeal process.

Note 2: It should be noted that ICANN also has other conflict resolution mechanisms available that could be considered in case any of the parties are dissatisfied with the outcome of this process.

Status Reporting:

As requested by the GNSO Council, taking into account the recommendation of the Council liaison to this group.

Problem/Issue Escalation & Resolution Processes:

{Note: the following material was extracted from Sections 3.4, 3.5, and 3.7 of the Working Group Guidelines and may be modified by the Chartering Organization at its discretion}

The IAG will adhere to [ICANN's Expected Standards of Behavior](#) as documented in Section F of the ICANN Accountability and Transparency Frameworks and Principles, January 2008.

If a IAG member feels that these standards are being abused, the affected party should appeal first to the Chair and Liaison and, if unsatisfactorily resolved, to the Chair of the Chartering Organization or their designated representative. It is important to emphasize that expressed disagreement is not, by itself, grounds for abusive behavior. It should also be taken into account that as a result of cultural differences and language barriers, statements may appear disrespectful or inappropriate to some but are not necessarily intended as such. However, it is expected that WG members make every effort to respect the principles outlined in ICANN's Expected Standards of Behavior as referenced above.

The Chair, in consultation with the Chartering Organization liaison(s), is empowered to restrict the participation of someone who seriously disrupts the IAG. Any such restriction will be reviewed by the Chartering Organization. Generally, the participant should first be warned privately, and then warned publicly before such a restriction is put into place. In extreme circumstances, this requirement may be bypassed.

Any IAG member that believes that his/her contributions are being systematically ignored or discounted or wants to appeal a decision of the WG or CO should first discuss the circumstances with the WG Chair. In the event that the matter cannot be resolved satisfactorily, the IAG member should request an opportunity to discuss the situation with the Chair of the Chartering Organization or their designated representative.

In addition, if any member of the IAG is of the opinion that someone is not performing their role according to the criteria outlined in this Charter, the same appeals process may be invoked.

Closure & Working Group Self-Assessment:

The IAG will close upon the delivery of the Final Report, unless assigned additional tasks or follow-up by the GNSO Council.

Section V: Charter Document History

Version	Date	Description
1.0		

Staff Contact:	<input type="text" value=" <Enter staff member name>"/>	Email:	Policy-Staff@icann.org
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Translations: If translations will be provided please indicate the languages below:										