

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 Elected Chair(s)>	
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:		

Comment [MK1]: To be determined by DT: An IAG does not necessarily need a chair, the previous one, for example, functioned more like an IRT with staff facilitation the meetings. Following agreement on scope and composition, DT should consider what approach would work best for this effort.

Background

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.

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[icann.org], "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. 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, 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 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 has 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 should be limited to:

- Recommendations on which modifications to the Revised ICANN Procedure for Handling WHOIS Conflicts with Privacy Law would address concerns raised during the public comment forum and are not considered inconsistent with the underlying policy recommendations;
- Recommendations on which aspects of the underlying policy recommendations should be reviewed, if it is deemed that the issues that have been identified are the result of the underlying policy recommendations but not the subsequent implementation (note, such a review would require the initiation of a Policy Development Process (PDP)).

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).

Objectives & Goals:

The WHOIS Procedure IAG shall develop, at a minimum, a Preliminary Report, which is to be published for public comment, and a Final Report for submission to the GNSO Council regarding the IAG's recommendations.

Deliverables & Timeframes:

The WHOIS Procedure IAG is expected to develop 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 and submit this to the GNSO Council.

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 goals

Comment [MK2]: Question for DT: Should IAG be limited to the concerns / options raised as part of the public comment forum, or should the IAG be allowed to go beyond that?

Comment [MK3]: Question for the DT: Are there other types of recommendations that the IAG should be able to make? Or these two align with the scope of its work?

Comment [MK4]: Question for consideration by DT: Should the IAG follow a similar approach as PDP WGs by providing an Initial Report for public comment followed by a Final Report for Council submission or are different deliverables anticipated? Note that the name of the Initial Report has been changed to Preliminary Report in line with what the previous IAG produced and to avoid confusion with a PDP.

- 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:

Option 1 (GNSO Working Group Model)

The Whois Procedure IAG will be open to all interested in participating. New members who join after work has been completed will need to review previous documents and meeting transcripts.

Option 2 (CCWG Model)

Participation in the Whois Procedure IAG is open to GNSO Stakeholder Group (SG) appointed Members, participants and observers. Members are appointed by GNSO Stakeholder Groups in accordance with their own rules and procedures. Each Stakeholder Group shall appoint a minimum of 3 and a maximum of 5 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 and the IAG. Members must, if and when necessary, ensure that the SGs 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 can do so at any time.

Option 3 (GNSO Review WG Model)

Each GNSO Stakeholder Group and/or Constituency will identify one primary and one alternate member to serve on the Whois Procedure IAG.

In addition, anyone interested will be able to join this working group as a participant or observer.

Comment [MK5]: For consideration by the DT: There are a number of different models the DT could consider, these are just some examples. The main guiding questions to resolve this issue appear to be: 1) is the IAG representative, i.e. should it reflect the make-up of the GNSO Council/community and 2) should it be open to participants / observers.

Option 4 (Standing Selection Committee Model)

The Whois Procedure IAG shall consist of a total of 9 members, appointed as follows:

- One member appointed by each Stakeholder Group of the Contracted Party House;
- One member appointed respectively by each of the Business Constituency, the Intellectual Property Constituency, and the Internet Service Providers and Connectivity Providers Constituency;
- Three members appointed by the Non-Commercial Stakeholder Group; and,
- One member from one of the three Nominating-Committee appointees to the GNSO Council.

If a member is not able to attend, that member will be responsible to identify an alternate who is expected to participate in the IAG deliberations in case of absence of the member. Members or alternates do not need to be Council members but they do need to be appointed and/or reconfirmed by the leadership of the appointing SG and/or C.

Chair Selection

Option 1 (WG Model)

Unless a Chair has already been named by the GNSO Council, normally a Chair will 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 may elect to have Co-Chairs and Vice-Chairs. Under extraordinary circumstances, ICANN staff may be requested to perform administrative co-ordination of the IAG until such time a Chair can be appointed. Once selected, the IAG Chair will need to be confirmed by the GNSO Council. The newly elected Chair will act on a provisional basis until the GNSO Council has confirmed the appointment.

Option 2 (IRT Model)

The GDD Project Manager will lead the meetings of the IAG

Option 3 (CCWG Model)

A Chair is appointed by the GNSO Council to the Whois Procedure IAG at the same time as the charter is adopted.

Group Formation, Dependencies, & Dissolution:

The GNSO Secretariat should circulate a ‘Call For Volunteers’ as widely as possible in order to ensure broad representation and participation in the Working Group, including:

- Publication of announcement on relevant ICANN web sites including but not limited to the GNSO and other Supporting Organizations and Advisory Committee web pages; and
- Distribution of the announcement to GNSO Stakeholder Groups, Constituencies and other ICANN Supporting Organizations and Advisory Committees

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

Comment [MK6]: For consideration by the DT: Again, here are a couple of options outlined (there may be others) that the DT could consider for how the IAG is managed & led.

Comment [MK7]: For consideration by the DT: Depending on how the IAG is structured and its main objective is formulated, the DT may need to consider whether the IRT guidelines are more applicable or the GNSO WG Guidelines (or a combination of both) and determine whether any further specific references need to be included in the charter.

Comment [MK8]: To be updated pending agreement on membership criteria agreement.

distribution and other substantive contributions when deemed appropriate.
Staff assignments to the Working Group: <ul style="list-style-type: none"> • TBD
The standard WG roles, functions & duties shall be applicable to the IAG as specified in Section 2.2 of the Working Group Guidelines.
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:
{Note: The following material was extracted from the Working Group Guidelines, Section 3.6. If a Chartering Organization wishes to deviate from the standard methodology for making decisions or empower the WG to decide its own decision-making methodology, this section should be amended as appropriate}.
The Chair will be responsible for designating each position as having one of the following designations: <ul style="list-style-type: none"> • 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. <i>[Note: For those that are unfamiliar with ICANN usage, you may associate the definition of 'Consensus' with other definitions and terms of art such as rough consensus or near consensus. It should be noted, however, that in the case of a GNSO PDP originated Working Group, all reports, especially Final Reports, must restrict themselves to the term 'Consensus' as this may have legal implications.]</i> • Strong support but significant opposition - a position where, while most of the group supports a recommendation, there are a significant number of those who do not support it. • Divergence (also referred to as No Consensus) - a position where there isn't strong support for any particular position, but many different points of view. Sometimes this is due to irreconcilable differences of opinion and sometimes it is due to the fact that no one has a particularly strong or convincing viewpoint, but the members of the group agree that it is worth listing the issue in the report nonetheless. • Minority View - refers to a proposal where a small number of people support the recommendation. This can happen in response to a Consensus, Strong support but significant opposition, and No Consensus; or, it can happen in cases where there is neither support nor opposition to a suggestion made by a small number of individuals.
In cases of Consensus , Strong support but significant opposition , and No Consensus , an effort should be made to document that variance in viewpoint and to present any Minority View recommendations that may have been made. Documentation of Minority View recommendations normally depends on text offered by the proponent(s). In all cases of Divergence , the WG Chair should encourage the submission of minority viewpoint(s).

Comment [MK9]: For consideration by the DT: What is the expectation with regards to staff support. IRTs and other implementation focused efforts are usually supported by GDD staff, with policy staff participating in an advisory capacity. Is that also the expectation here, or is support expected to be provided like it is done for GNSO Working Groups with policy staff supporting the effort and GDD staff participating in an advisory capacity?

Comment [MK10]: May require updating depending on the membership & chair model chosen

Comment [MK11]: For consideration by the DT: This section will need to be updated to align with the membership model chosen. Also, the DT may want to decide to restrict itself to full consensus / consensus positions.

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, or Co-Chairs, make an evaluation of the designation and publish it for the group to review.
- ii. After the group has discussed the Chair's estimation of designation, the Chair, or Co-Chairs, should reevaluate and publish an updated evaluation.
- iii. Steps (i) and (ii) should continue until the Chair/Co-Chairs make an evaluation that is accepted by the group.
- iv. In rare case, a Chair may decide that the use of polls is reasonable. Some of the reasons for this might be:
 - o 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.
 - o It becomes obvious after several iterations that it is impossible to arrive at a designation. This will happen most often when trying to discriminate between **Consensus** and **Strong support but Significant Opposition** or between **Strong support but Significant Opposition** and **Divergence**.

Care should be taken in using polls that they do not become votes. A liability with the use of polls is that, in situations where there is **Divergence** or **Strong Opposition**, there are often disagreements about the meanings of the poll questions or of the poll results.

Based upon the WG's needs, the Chair may direct that WG participants 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 entire Working Group and, for this reason, should take place on the designated mailing list to ensure that all Working Group members have the opportunity to fully participate in the consensus process. It is the role of the Chair to designate which level of consensus is reached and announce this designation to the Working Group. Member(s) of the Working Group should be able to challenge the designation of the Chair as part of the Working Group discussion. However, if disagreement persists, members of the WG may use the process set forth below to challenge the designation.

If several participants (see Note 1 below) in a WG 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 WG explaining why the decision is believed to be in error.
2. If the Chair still disagrees with the complainants, the Chair will forward the appeal to the CO liaison(s). The Chair must explain his or her reasoning in the response to the complainants and in the submission to the liaison. If the liaison(s) supports the Chair's position, the liaison(s) will provide their response to the complainants. The liaison(s) must explain their reasoning in the response. If the CO liaison disagrees with the Chair,

the liaison will forward the appeal to the CO. Should the complainants disagree with the liaison support of the Chair's determination, the complainants may appeal to the Chair of the CO or their designated representative. If the CO agrees with the complainants' position, the CO should recommend remedial action to the Chair.

3. In the event of any appeal, the CO will attach a statement of the appeal to the WG and/or Board report. This statement should include all of the documentation from all steps in the appeals process and should include a statement from the CO (see Note 2 below).

Note 1: Any Working Group 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 Working Group 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: <Enter staff member name> **Email:** Policy-Staff@icann.org

Translations: If translations will be provided please indicate the languages below:

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