

PROCEDURE FOR CONFLICTS Step-by-Step

Whois Task Force 2 anticipated “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). The Task Force determined that “Registrars and Registries encountering such local difficulties should be allowed an exception from the contractual WHOIS obligation for the part of the WHOIS data in question by the local regulation.” However, the Task Force recognizes that it is desirable to maintain, insofar as it is possible, the uniformity of gTLD registrar and registry contracts to create a level playing field for competition and maintain predictability for all users of the domain name system. The following procedures are intended 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 personally identifiable data via Whois.

The procedure

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 RAA (“Whois Proceeding”), a Registrar/ Registry must within thirty (30) days provide ICANN’s General Counsel 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 for resolving the problem.
- Contact information for the responsible territorial government agency and a statement from the registrar authorizing ICANN to communicate with those officials on the matter. If the registrar 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 is basing its action or investigation, if such information has been indicated by the government.

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.

Step Two: Consultation

Unless impractical under the circumstances, the ICANN General Counsel shall upon receipt and review of the notification (which shall include dialogue with the registrar/registry if appropriate), begin a process of consultation with the local/national enforcement authorities together with the registrar/registry. The goal of the consultation process shall be to seek to resolve the problem in a manner that preserves the ability of the registrar to comply with its contractual obligations to the greatest extent possible.

If the investigation or other matter 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., 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 to make changes in its practices affecting compliance with 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.

Step Three: General Counsel analysis and recommendation

If the local/national government requires changes that, in the opinion of the General Counsel, prevent full compliance with contractual WHOIS obligations, ICANN shall 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. The report must 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 for which the exception is requested; and
- iii. Recommendation of whether ICANN should agree to an exception for the registrar/registry from one or more identified WHOIS contractual provisions. The report shall include a detailed justification of its recommendation. As a general rule, the General Counsel shall not recommend any enforcement action against such registry or registrar unless it finds that enforcement action is necessary in order to preserve the operational stability, reliability, security, or global interoperability of the Internet's unique identifier systems.

The registrar/registry shall 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.

Step Four: Resolution

Keeping in the mind the principles set forth in Step Three above, the Board shall 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 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, shall ordinarily be made public, along with the reasons for it, and shall 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 shall 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 shall 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.