



**Comment on IAG Initial
Report and Proposed
Revisions to the ICANN
Procedure for Whois
Conflicts With Privacy Law**

Status: FINAL

Version: 2

17-Nov-2015

Business Constituency Submission

GNSO//CSG//BC

Background

This document is the response of the ICANN Business Constituency (BC), from the perspective of business users and registrants, as defined in our Charter:

The mission of the Business Constituency is to ensure that ICANN policy positions are consistent with the development of an Internet that:

1. promotes end-user confidence because it is a safe place to conduct business
2. is competitive in the supply of registry and registrar and related services
3. is technically stable, secure and reliable.

Comment

On 22-May-2014, ICANN opened a public comment period to solicit community feedback on the Whois National Law Conflict Procedure.¹ The Business Constituency submitted comments to this proceeding on August 5, 2014.² The IAG Initial Report and Proposed Revisions to the ICANN Procedure for Whois Conflicts With Privacy Laws opened on October 5, 2015.³ The report seeks public comment on five specific questions. The Business Constituency addressed these questions under the headings below.

Alternate Triggers

The report discusses alternate triggers, including a trigger consisting of a legal opinion from a nationally recognized law firm. The community is specifically asked to comment on the following questions:

- 1.) Should the Procedure include a trigger consisting solely of a nationally recognized law firm opinion?
- 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?
- 3.) How feasible is it for a contracted party to obtain an opinion from a government agency charged with enforcing its local privacy laws?
- 4.) 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 <https://www.icann.org/public-comments/whois-conflicts-procedure-2014-05-22-en>

² <http://www.bizconst.org/wp-content/uploads/2014/08/BC-comment-on-WHOIS-conflicts-with-national-law.pdf>

³ <https://www.icann.org/public-comments/iag-whois-conflicts-privacy-2015-10-05-en>

In any revised conflict resolution model the Business Constituency believes there must be:

- 1) respect for the rule of law, and;
- 2) a high threshold for conflict resolution, but one that does not rely solely on government initiative particularly in light of the evidence that conflicts are not commonplace.

Respect the rule of law: Businesses are obligated to comply with all relevant laws in the jurisdictions in which they operate. ICANN contracts cannot and should not supersede the law in any jurisdiction. In those rare instances in which ICANN contractual language clearly conflicts with established law in a certain jurisdiction, the exemption process should provide a clear, tightly focused process for resolving such conflicts.

Maintain a high threshold for conflict resolution: The Business Constituency believes that the triggering mechanism(s) for the conflict process should be limited to circumstances where registrars find they cannot comply with their contract obligations as a result of specific legal requirements in a specific jurisdiction. While in the past the procedure has relied on governments to initiate the process, we believe additional avenues for raising conflict are reasonable and should be added. Businesses are best placed to understand and assess the legal risk of any particular legal requirement and should be given a direct opportunity to seek an exemption from particular contract requirements.

The Business Constituency supports inclusion of the Contracted Party Request Trigger as an alternative to having governments alone drive the conflict resolution process. We support the list of supporting material the requesting party should provide in making its request. Such material will ensure a continued high threshold and also provide a strong factual basis for any exceptions.

The BC has some concerns regarding the practicality of getting the necessary documentation from the relevant government authority. The BC would suggest that if a contracted party is unable to obtain the appropriate documentation after reasonable good faith efforts, it be allowed to file for an exception and have ICANN make an additional written request from the government for their view. Given the rarity of the need for exceptions (none have been sought to date) and the improvement of this approach over the current approach of requiring governments to initiate all requests, this proposal, as amended, is a reasonable evolution of the current policy.

We also support a transparent and public process for the consideration of the request, as outlined in the proposal.

ICANN's role in Whois Conflicts

The report also discusses the role of ICANN in the procedure for handling Whois conflicts with privacy laws. Specifically, the report asks the community to consider the following questions:

- 1.) What role if any should ICANN play in investigating the basis for a trigger?
- 2.) Is it appropriate to trust ICANN to investigate whether a request for relief satisfies the grounds to trigger the procedure?

The BC generally supports ICANN's role in investigating and determining the appropriateness of an exemption. We support the IAGs proposals in relation to the Contracted Party Trigger for the opportunity for groups to provide public comment and additional expert input.

Minimize the scope of exemptions: As is the case in the current policy, exceptions should be narrowly applied and granted in a way that preserves as much underlying contractual language as possible within the scope of the governing legal framework. Exemptions and modifications should be geographically specific, and should not be extended to registrants and registrations not covered by the conflicting national law.

Engage the Community: As the Business Constituency has stated in previous filings, the ICANN community should serve as a check against abuse of the conflict resolution process. The BC supports allowing constituency groups to provide comment and input in the exemption/modification process. Given the low volume of conflict-resolution requests, the additional time needed to engage in the public comment process should not impede a fast resolution.

ICANN also should collect and analyze data on the effectiveness of the new Procedure, and publish information annually to support community engagement.

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This comment was drafted by Cheryl Miller and Ellen Blackler, with edits by Marie Pattullo.

It was approved in accordance with the BC Charter.