Revised ICANN Procedure for Handling WHOIS Conflicts with Privacy Law: Assessment and Next Steps

Introduction

In accordance with the ICANN Procedure for Handling Whois Conflicts with Privacy Law (Whois Procedure), this paper opens a review process to gather community input on the effectiveness of the revised Whois Procedure, which was made effective on 18 April 2017. Furthermore, as requested by the Generic Names Supporting Organization (GNSO) Council, ICANN is publishing this paper to assess the practicality and feasibility of the triggers in the revised Whois Procedure.[1] Given that the Whois Procedure has recently been updated and to date no registrar or registry operator has formally invoked the procedure, ICANN staff has made their best efforts to collect and analyze community discussions related to the Whois Procedure that will allow for evaluation of the triggers required for invoking the procedure.

Based on community conversations and the outcome of its previous review, the Whois Procedure has been updated to incorporate an "Alternative Trigger" in Step One of the procedure, in addition to the existing trigger to invoke the procedure. The Whois Procedure, in summary describes a process by which ICANN and contracted parties (both ICANN-accredited registrars and gTLD registries) may negotiate changes to their contractual obligation to collect, display, or distribute Whois data because of a conflict with other legal obligations, namely, local or national laws.

The existing trigger in the Whois Procedure allows a registry operator or ICANN-accredited registrar to invoke the procedure if they are in receipt of a notification of an action that its compliance with Whois obligations are prevented by local laws. With the additional trigger, a registry operator or ICANN-accredited registrar may now also invoke the procedure by providing ICANN with a written statement from the applicable government agency responsible for enforcing its data privacy laws indicating that a Whois obligation in an ICANN contract conflicts with applicable national law.

Although the Whois Procedure has not been invoked, concerns related to the "Alternative Trigger" were identified by the community during the public comment period. Specifically, commenters cited challenges with obtaining a written statement from a governmental agency, as these statements may not be easily attained, especially by smaller registries and registrars who may not have the resources to obtain such advice. While it may be feasible to request input from a government agency to indicate that a particular Whois obligation conflicts with

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[1] "The GNSO Council requests 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 discussed in the IAG Final Report and reports back accordingly to the GNSO Council." The full text of the GNSO Council Resolution is available at https://gnso.icann.org/en/council/resolutions#201509.

national law, obtaining this information may be challenging given that governmental agencies are not always easily accessible and may be reluctant to provide a written statement.

As requested by the GNSO Council, this public comment forum has been opened from 3 May to 12 June to collect community input on the practicality and feasibility of the "Alternative Trigger" in comparison to the existing triggers as well as suggestions for moving forward with the review. Outputs from this assessment and comment process are expected to inform the next periodic review of the procedure.

Background

In November 2005, the 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:

1. 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.
2. Create goals for the procedure which include:
   a. Ensuring that ICANN staff is informed of a conflict at the earliest appropriate juncture;
   b. 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;
   c. 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
   d. Preserving sufficient flexibility for ICANN staff to respond to particular factual situations as they arise".[2]

The ICANN Board of Directors adopted the recommendations in May 2006 and directed staff to develop such a Procedure. A draft Procedure was posted for public comment, and input was specifically solicited from the Governmental Advisory Committee (GAC). The GAC recommended adding a provision, which was included as section 1.4 in the procedure, urging a registrar or registry to work with relevant national governments to ensure adherence to domestic and international law, as well as applicable international conventions.

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[2] See: http://gnso.icann.org/en/issues/WHOIS-privacy/council-rpt-18jan06.htm

If the Whois requirements require changes that ICANN determines prevent compliance with contractual Whois obligations, ICANN may refrain, on a provisional basis, from taking enforcement action for non-compliance, while ICANN prepares a public report and recommendation and submits it to the ICANN Board for a decision. Given that to date no registrar or registry operator has formally invoked the Whois Procedure, and yet numerous concerns have arisen from contracted parties and the wider community, ICANN launched a review in 2014, as provided in the Whois Procedure's final clause.[3]

Analysis of the Existing Triggers and Proposed Alternatives

Given that the Whois Procedure has not been invoked to date, no data is available to determine the effectiveness of the triggers. Thus, this analysis takes into account the discussions in the GNSO after the submission of the Implementation Advisory Group (IAG) Report as well as community input received on other Whois related public comment forums and during a review that was launched in 2014 with the publication of a paper for public comment, which was intended to solicit community feedback on the effectiveness of the procedure. The paper outlined the procedure's steps and invited public comments on a series of questions related to how the Whois Procedure may be modified while respecting the intent of the original GNSO policy recommendations.

Based on the feedback received in 2014, there was broad consensus among commenters that access to the Whois database is important, but should not come at the expense of violating local and national laws in the countries where contracted parties operate. Several respondents suggested the procedure has been effective because it has alleviated potential conflicts with laws prior to being invoked. As such, those commenters suggested narrowly tailoring the exemptions that are granted as a result of the procedure being invoked and crafting the procedure in such a way as to ensure that only those narrow exemptions where conflict with law is clear are granted.

In addition, some of the comments submitted by the contracted parties pointed out that it is impractical to wait for legal action and potential penalties to be launched before invoking the Whois Procedure and that it should be possible to address conflicts prior to an official investigation having commenced. While no commenters outright opposed changes to the procedure, several urged caution in making changes and indicated that because the procedure has not been invoked it may be an indicator of a process serving its purpose, while others noted that the trigger may be ineffective and as such was never before used.

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[3] "With substantial input from the relevant registries or registrars, together with all constituencies, ICANN will review the effectiveness of the process annually." See Step Six: Ongoing Review of the Whois Procedure available at https://www.icann.org/resources/pages/whois-privacy-conflicts-procedure-2008-01-17-en

Furthermore, several respondents recommended bringing the Whois Procedure in line with the 2013 Registrar Accreditation Agreement ("RAA") Data Retention Waiver process, which is described in more detail in the next section. Other options for triggering the procedure were also suggested as part of the public comment forum, which were subsequently taken into account during the community-led review of the Whois Procedure.

Related Processes

Given that the procedure has not been formally invoked, our analysis draws upon ICANN's experience administering other processes where a contracted party is seeking ICANN's approval for new services, or waiving certain contractual requirements. Furthermore, some public comments have suggested that other mechanisms used by ICANN and contracted parties to address concerns related to contractual obligations and applicable laws could be considered for the Whois Procedure.

Registry Services Evaluation Process (RSEP)

Specification 4 of the new gTLD registry agreement outlines the requirements for Whois data retention and display. Some registries have used the Registry Services Evaluation Process (RSEP) to initiate changes to Whois requirements in their registry agreements. The RSEP is first used to evaluate security, stability and competition issues as they relate to any proposed changes in registry services. If a new service is not found to raise any concerns in these areas, it would then be evaluated to determine if the request requires an amendment to the registry agreement to implement the registry service. The RSEP defines registry services to include, among others, receiving data related to domain name registrations, as well as disseminating contact information for domain name registrations. As of April 2017, a total of 217 RSEP requests have been approved.

The requesting party must submit a form provided by ICANN to begin the review process. The requesting party may have consultations with ICANN prior to submitting its request. Once a completed request is submitted, ICANN conducts a preliminary determination for each RSEP within 15 calendar days to determine if there are any significant competition, security or stability issues related to the request. An additional 2-5 consultation days are available at the end of this window for notification and discussion with the registry operator. If there are no security or stability or competition issues, the request is approved and the registry operator can implement the change. If material changes are needed to the registry agreement to implement the new service, ICANN works with the registry operator on a proposed amendment.

If ICANN's preliminary determination is that the proposed services raises significant competition, security or stability issues, ICANN works with the contracted party to continue the technical or competition-related analysis, as appropriate, which may take up to 45 calendar days, and may also require a public comment period and a decision from the ICANN Board.

The 2013 Registrar Accreditation Agreement ("RAA") Data Retention Waiver Process

Under this Requests process, a registrar may request a compliance waiver of the data retention requirements, by presenting ICANN with a written opinion from a nationally recognized law firm, or ruling or written guidance from a government body that states that collecting or retaining one or more data elements in the manner required by the specification violates applicable law. A general assertion that the data collection and Data Retention Specification requirements are unlawful is not sufficient. Rather, the waiver request must specify the applicable law, the specific allegedly offending data collection and/or retention requirement(s), and the manner in which the collection and/or retention violates the law.

This specificity helps ICANN to determine the appropriate limitations on the scope and duration of data collection and retention requirements when granting the waiver. This also helps ICANN balance the interests of the registrar, governments, and the broader Internet community when considering granting such waivers. In addition, if ICANN has previously waived compliance with the requirements for a registrar located in the same jurisdiction and the applying registrar is subject to the same applicable law, the registrar may request the same waiver.

The 2013 RAA calls for ICANN and the registrar to discuss data retention waiver requests in good faith in an effort to reach a mutually acceptable resolution. The Data Retention Specification contemplates potential future modifications to the Whois Procedure in section 2 of the RAA.[4] Because each country may interpret its data privacy requirements differently, ICANN is working through each of the submitted requests country-by-country.

The complexity and diversity of national privacy laws has resulted in considerable investments of time and resources by ICANN and registrars alike. In countries with data privacy laws applicable to registrars, ICANN has found that restrictions generally permit the retention of registration data, but only for legitimate purposes, and for a period no longer than is necessary for the purposes for which the data were collected or for which they are further processed. What constitutes a legitimate purpose and how long data can be retained are complicated questions, and the answers may vary from one country to the next, even within the EU. As of April 2017, a total of 35 Data Retention Waivers were granted to registrars.

Deliberations of the Implementation Advisory Group (IAG)

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[4] "Until such time as ICANN's Procedure for Handling Whois Conflicts with Privacy Law is modified to include conflicts relating to the requirements of this Specification and if ICANN agrees with Registrar's determination, ICANN's office of general counsel may temporarily or permanently suspend compliance and enforcement of the affected provisions of the Data Retention Specification and grant the waiver request. Prior to granting any exemption, ICANN will post its determination on its website for a period of thirty (30) calendar days."

Following review of the public comments received in 2014, an IAG was formed to consider the need for changes to how the procedure is invoked and used. The IAG started its work on 7 January 2015. The IAG's work was based on the issues and questions laid out in its Mission and Scope. Specifically, the IAG discussed 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 reached agreement on the "Alternative Trigger" proposal whereby a contracted party would not have to wait to receive notification of a proceeding against it. The GNSO Council recently confirmed that this proposal was in line with the existing policy recommendations related to Whois conflicts with national laws, and voted to authorize ICANN to adopt the "Alternative Trigger" in the procedure. This trigger allows a contracted party to seek 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 submit that statement to ICANN.

The IAG discussed other possible triggers, but did not reach consensus on including those in their proposal. Those alternatives are described here:

Written Legal Opinion Trigger

- A number of IAG members supported a similar approach to the 2013 RAA Data Retention Waiver described above, namely the addition of a trigger consisting of a written legal opinion from a nationally recognized law firm stating that national laws or statutes in the country of incorporation of a contracted party will affect its compliance with the provisions of the Registrar Accreditation Agreement or other contractual agreement with ICANN dealing with the collection, display or distribution of personally identifiable data via Whois.

Contracted Party Request Trigger

- Some IAG members supported a similar mechanism to the Registry Services Evaluation Process, also described above. Under the Contracted Party Request Trigger, a contracted party would request for ICANN to investigate whether the request has met the required standard for triggering the procedure. The requesting party would need to present ICANN with:
  o A request describing the legal conflict and why it's impossible to find a legal alternative or other alternatives to address existing privacy concerns such as registrant consent or privacy/proxy services (mandatory)
  o Written support by all other registries and/or registrars potentially affected by the legal conflict or justification for why they are the only affected party (mandatory)
  o Written support/approval from a relevant governmental privacy agency (if one exists) (highly recommended but not mandatory)

- o Written support or non-objection to the request from the relevant GAC member or relevant government agency if the jurisdiction does not have a GAC member (mandatory)
- ICANN's investigation of the grounds for the request would include but not be limited to seeking input from the GAC, law enforcement and other interested parties; posting the request for 45-days to allow parties to file objections and requiring resolution of any objections. ICANN may also seek outside expert advice to help inform a final decision.

Minority Views

- Two IAG members submitted statements and proposals on which there was not majority support within the IAG. According to one, the relevant laws in the European Union are regional in character and the entities responsible for authoritative interpretation of applicable law are not necessarily the same as the entities responsible for enforcement. Thus, the "Alternative Trigger" should recognize regional laws on privacy and not just national laws, changing the text in the trigger to refer to "applicable local law."
- Under the "Alternative Trigger," each Registry or Registrar has to individually request a specific exemption. However, one Minority View suggested a system of "block exemption" whereby all the contracted parties within the same jurisdiction would receive the same exemption on the basis of a single procedure. Specifically, in the case of the European Union, all contracted parties incorporated in the EU Member States would benefit from single exemptions.
- Furthermore, one of the two statements in the Minority Views section, suggested that a new policy on Whois conflicts with law be adopted. In addition, the commenter suggested the universal application of international best practices in the matter of privacy policy and data protection. Under the new suggested Whois policy, the contracted party would conform to applicable local law, and ICANN would have the option to initiate a contrary procedure should it deem that the stability and security of the Internet and the DNS require a contracted party to comply with what may otherwise be considered standard Whois obligations.

The IAG welcomed community input as to whether its recommendation to add to the procedure an "Alternative Trigger" (in the absence of a Whois Proceeding[5]) should be adopted in its final report. The IAG also welcomed comment on the other triggers that did not garner majority support within the working group. ICANN staff published the Report of Public Comments on the IAG's initial report on 21 January 2016.

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[5] A Whois Proceeding is a notification of an investigation, litigation, regulatory proceeding or other government or civil action that might affect its compliance with the provisions of the Registrar Accreditation Agreement ("RAA") or other contractual agreement with ICANN dealing with the collection, display or distribution of personally identifiable data via WHOIS.

Most of the comments received focused primarily on whether and how to supplement the existing triggers for invoking the Whois Conflicts Procedure. Consistent with the IAG's initial report, there appeared to be consensus support among the commenters for one recommendation only. There were diverging views on most of the other issues raised in the comments. The comments did not support any significant changes to the current implementation of the Whois conflicts with privacy law policy recommendations.
With respect to the Written Legal Opinion Trigger, commenters were divided on whether this trigger would meet the policy's requirement of a credible demonstration of legal prevention from complying with the Whois requirements. These opponents note that law firms do not enforce local law and different firms in the same jurisdiction may present conflicting opinions. The Contracted Party Request Trigger received more opposing comments. Parties opposed it on various grounds and stated that the list of supporting material that the requesting party should provide in making its request is vague and undefined.

With respect to the Minority Views, a few commenters indicated that adopting a new policy on Whois conflicts with privacy law would ensure that all contracted parties would receive the same privacy protection regardless of their jurisdiction. Furthermore, some commenters also indicated support for a "block exemption" as this system would eliminate a case-by-case approach and provide certainty for all registries and registrars. Additional public comments related to the Whois Procedure and proposed triggers, expressed concern that the procedure assumes ICANN has a role in determining whether a contracted party is complying with local law and that the solution should not involve an investigation before the process is triggered. One commenter noted that potential conflicts with privacy law could be avoided at the outset if more attention is given to assist registrars and ensure that lawful steps are taken by registrars when obtaining personal data for Whois. Another comment suggested that each contracted party should be entitled to self-assess in good faith its own understanding of applicable law and that ICANN should bear the burden of investigating a request if it believes a contracted party is in non-compliance with its contractual requirements.

Based on the IAG's deliberations and the public comments received on the initial report, the IAG recommended that the procedure include the "Alternative Trigger" proposal. With this change, a contracted party could seek a written statement from a government agency indicating that a particular Whois obligation conflicts with national law and submit that statement to ICANN as part of its request for exemption from the obligation.

On 26 May 2016, the IAG submitted its final report to the GNSO Council and recommended that the Whois Procedure be revised to incorporate an "Alternative Trigger," in addition to the existing trigger to invoke the procedure. The GNSO Council reviewed the IAG final report and concluded that the proposed modification to the procedure conforms to the intent of the original policy recommendations. As such, the GNSO Council passed a resolution in February 2017 adopting IAG's recommendation and confirmed its non-objection to the modification being implemented. The redline version of the Revised Procedure for Handling Whois Conflicts with Privacy Law is outlined in **Appendix 1**. The Council resolution also requested ICANN staff to

provide the assessment provided by this paper, and that this assessment would inform the next review of the procedure, which is to commence no later than 1 October 2017.

Analysis of the Alternative Trigger

Given that the "Alternative Trigger" has recently been incorporated into Step One of the procedure and the lack of available data concerning the Whois Procedure, our analysis of this additional trigger is based on input received from the community in response to the public comment period. As such, this section describes the "Alternative Trigger" and the consultation step added to the Whois Procedure, and identifies issues for consideration in the upcoming review.

Step One:

B. Alternative Trigger: Written Statement from Government Agency

Under the original Whois Procedure, a contracted party must have received notification of a Whois Proceeding[6] against it to invoke the procedure. With the addition of the "Alternative Trigger," as a new 1.5 under Step One, a party may now also invoke the procedure in the absence of a Whois Proceeding by presenting ICANN a written statement from the government agency charged with enforcing its data privacy laws indicating that a Whois obligation in an ICANN contract conflicts with national law.

The agency statement would have to identify the inconsistency the agency has found between national law and contractual obligations. In addition, the agency would have to certify that it has the legal authority to enforce the national law which it has found to be inconsistent with contractual obligations, and that it has jurisdiction over the contracted party for the purposes of such enforcement.

Step Two: Consultation

In cases to which the "Alternative Tigger" applies, the Consultation Step includes in 2.5 a public consultation in which all interested parties can review the written statement submitted in the Notification Step and to comment on all aspects of it. In such cases, ICANN would also consult with the relevant GAC representative (if any) from the country in question.

Some challenges and concerns were identified by the community during the public comment period, particularly related to requiring a written statement from a governmental agency, as these statements may not be easily attained, especially by smaller registries and registrars who may not have the resources to obtain such advice. While it may be feasible to request input from a government agency to indicate that a particular Whois obligation conflicts with national law, obtaining this information may be challenging given that governmental agencies are not always easily accessible and may be reluctant to provide a written statement.

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[6] Ibid.

Taking this into account, this assessment identifies a number of questions that the community, contracted parties, data protection agencies, law enforcement and other relevant parties may want to consider regarding the revised Whois Procedure and the process itself. The questions raised below aim to guide the discussion and collect input to inform the next review of the procedure.

Questions Concerning the Effectiveness of the Revised Whois Procedure

Trigger:

1. How feasible is it for data protection agencies to provide a party with a written statement indicating that a Whois obligation in an ICANN contract conflicts with national law?

2. What type of evidence or documentation should a requesting party provide to the data protection agencies?

3. What challenges, if any, will data protection agencies face in terms of providing a party with a written statement indicating that a Whois obligation in an ICANN contract conflicts with national law?

4. What improvements or changes could be made to better engage data protection agencies in this process, i.e. Would direct contact with ICANN make the process more efficient?

5. Is there a forum for businesses to engage with data protection agencies on best practices in your jurisdiction?

6. What experience, if any, have community members had with requesting similar written statements from data protection agencies?

7. In cases where an exemption has been granted for a particular conflict with local privacy laws, should it automatically apply to all contracting parties that fall within the jurisdiction of the local law (e.g. all contracted parties incorporated in the European Union Member States)?

8. Regarding countries that may not have an official data protection authority, which bodies would be considered authoritative enough to provide creditable evidence of a conflict with national law and Whois obligations?

9. Should a third trigger, such as the Contracted Party Request or the Legal Opinion trigger, be incorporated into the modified Whois Procedure to mitigate issues related to

obtaining statements from a governmental agency? Would these triggers be considered to be not consistent with the underlying policy recommendations? If so, why not?

10. What triggers to the Whois Procedure would be considered consistent with the underlying policy recommendations?

11. 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?

12. Should the procedure be revised to allow for invocation prior to contracting with ICANN as a registry of registrar? If so, how would that alter the contracting process and what parties would be most appropriate to include?

13. Absent an enforceable order, what steps can be taken to inform a contracted party that their contractual obligations regarding Whois data is not in compliance with national laws?

14. What other factors could be considered to make the Whois Procedure more effective?

Public Consultation:

15. Are there other relevant parties who should be included in the Consultation Step? What should their roles be in the consultation process?

16. How would ICANN ensure that parties identified in the consultation phase and/or trigger step are able to provide the opinion or input requested as part of their respective role?

17. How should public comments be incorporated into the procedure?

18. What role should comments have in ICANN's decision-making process?

19. What length of public comment period is appropriate to ensure that the procedure is completed in a timely fashion?

20. How should comments be analyzed?

Process and Next Steps:

21. Should the underlying policy recommendations on Whois Conflicts with privacy law be revisited?

22. How should the issues and suggestions raised during the public comment forum be addressed in this review?

Next Steps

In response to a GNSO Council request, ICANN staff has published this assessment of the "Alternative Trigger" in comparison to the existing trigger in Step One of the procedure as well as the other triggers discussed in the IAG final report. To carry out a review of the procedure, ICANN is opening a public comment period to gather community input on the utility of the "Additional Trigger" and existing trigger, including suggestions for moving forward, and responses to the proposed questions as outlined in this paper.

Furthermore, the GAC has expressed particular interest in the activities related to the Whois-related matters and was recently briefed by the Public Safety Working Group (PSWG) at ICANN 58 on the need to achieve a balance between privacy, the needs of law enforcement and public interests in any future review of Registry Directory Service.[7] Thus, as the public comment period is underway, ICANN will also continue to solicit feedback by reaching out to GAC and engaging their participation in the public comment forum.

Feedback is especially important to ensure that all issues that need to be considered are identified, and to help determine those issues that have most impact, and accordingly, the areas where community resources will be best focused. To help execute an effective review process, ICANN encourages thoughtful input from a diverse set of stakeholders.

Following the close of the public comment period, ICANN will summarize and incorporate the feedback received into a report of public comments, as well as map the different suggestions provided by the community. Subsequently, ICANN will review the body of comment and report back accordingly to the GNSO Council. As directed by the procedure, this assessment is intended to inform the next periodic review of the Whois Procedure, which will commence no later than 1 October 2017, as requested by the GNSO Council. Comments may be submitted until 12 June.

The community led review of the procedure may result in additional changes to the Whois Procedure or the community members may recommend the GNSO Council to initiate a policy development process to review policy recommendations underlying this procedure.

Appendix 1 – Revised ICANN Procedure For Handling WHOIS Conflicts with Privacy Law Procedure For Handling WHOIS Conflicts with Privacy Law

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[7] See GAC Copenhagen Communiqué available at:
https://gacweb.icann.org/display/gacweb/Governmental+Advisory+Committee

The following is a redline of the WHOIS Procedure, incorporating the recently added "Alternative Trigger."

Revised ICANN Procedure For Handling WHOIS Conflicts with Privacy Law
Effective Date 18 April 2017

Introduction and background

0.1 In December 2003, [1] the WHOIS Task Force 2 of the GNSO recommended the development of a procedure to allow gTLD registry/registrars to demonstrate when they are prevented by local laws from fully complying with the provisions of ICANN contracts regarding personal data in WHOIS.

0.2 In November 2005 [2], the GNSO concluded a policy development process on establishing such a procedure. It follows the 'well-developed advice on a procedure' recommended by the WHOIS Task Force and approved by the GNSO Council. [3] In May 2006, the ICANN Board [4] adopted the policy and directed ICANN staff to develop and publicly document a conflicts procedure.

0.3 On 3 December 2006, ICANN staff published the Draft ICANN Procedure for Handling WHOIS Conflicts with Privacy Law [insert footnote, http://gnso.icann.org/issues/whois-privacy/whois_national_laws_procedure.htm]. ICANN sought input on the draft procedure from the Governmental Advisory Committee (GAC). Revised language has been incorporated into 1.4 below.

0.4 On 5 October 2015 the Implementation Advisory Group on WHOIS conflicts with National Law[1] published its report outlining possible improvements to this procedure. Public comment was sought on the report of the advisory group from 5 October to 17 November 2015. The final report was submitted to the GNSO Council for consideration at its May 2016 Meeting.

0.5 The procedure outlined below details how ICANN will respond to a situation where a registrar/registry [5] indicates that it is legally prevented by local/national privacy laws or regulations from complying with the provisions of its ICANN contract regarding the collection, display and distribution of personal data via WHOIS. The procedure is for use by ICANN staff. While it includes possible actions for the affected gTLD registry/registrar, this procedure does not impose any new obligations on registries/registrars or third parties. It aims to inform registries/registrars and other parties of the steps that will be taken when a possible conflict

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[1] https://community.icann.org/display/WNLCI/WHOIS+and+national+law+conflicts+IAG+Home

between other legal obligations and the ICANN contractual requirements regarding WHOIS is reported to ICANN.

Step One:

A. Notification of Whois Proceeding

1.1 At the earliest appropriate juncture on receiving notification of an investigation, litigation, regulatory proceeding or other government or civil action that might affect its compliance with the provisions of the Registrar Accreditation Agreement ("RAA") or other contractual agreement with ICANN dealing with the collection, display or distribution of personally identifiable data via WHOIS ("WHOIS Proceeding"), a registrar/registry should provide ICANN staff with the following:

- Summary description of the nature and status of the action (e.g., inquiry, investigation, litigation, threat of sanctions, etc.) and a range of possible outcomes.
- Contact information for the responsible official of the registrar/registry for resolving the problem.
- If appropriate, contact information for the responsible territorial government agency or other claimant and a statement from the registrar/registry authorizing ICANN to communicate with those officials or claimants on the matter. If the registrar/registry 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 or other claimant is basing its action or investigation, if such information has been indicated by the government or other claimant.
- Description of efforts undertaken to meet the requirements of both local law and obligations to ICANN.

1.2 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.

1.3 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. ICANN will ordinarily respond favorably to such requests to the extent that they can be accommodated with other legal responsibilities and basic principles of transparency applicable to ICANN operations.

1.4 A registrar or registry that is subject to a WHOIS proceeding should work cooperatively with the relevant national government to ensure that the registrar or registry operates in conformity with domestic laws and regulations, and international law and applicable international conventions.

B. Alternative Trigger: Written Statement from Government Agency

1.5 In the absence of a Whois proceeding, a registry or registrar may present to ICANN a written statement from agency:

    (1) Specifying the facts before it, i.e.,

        (i) the specific contracted party in question (registrar or registry)
        (ii) the applicable terms of service/registration agreements agency has reviewed
        (iii) the applicable provisions of the ICANN contract in question
        (iv) the applicable law it has analyzed

    (2) Identifying and analyzing the inconsistency agency has found between national law and contractual obligations, citing specific provisions of each; and

    (3) Certifying that agency has the legal authority to enforce the national law which it has found to be inconsistent with contractual obligations, and that it has jurisdiction over the contracted party for the purposes of such enforcement

Step Two: Consultation

2.1 The goal of the consultation process should be to seek to resolve the problem in a manner that preserves the ability of the registrar/registry to comply with its contractual WHOIS obligations to the greatest extent possible.

2.1.1 Unless impractical under the circumstances, upon receipt and review of the notification, ICANN will consult with the registrar/registry. Where appropriate under the circumstances, ICANN will consult with the local/national enforcement authorities or other claimant together with the registrar/registry.

2.1.2 Pursuant to advice from ICANN's Governmental Advisory Committee, ICANN will request advice from the relevant national government on the authority of the request for derogation from the ICANN WHOIS requirements.

2.2 If the WHOIS Proceeding ends without requiring any changes or the required changes in registrar/registry practice do not, in the opinion of ICANN, constitute a deviation from the Registrar Accreditation Agreement ("RAA") or other contractual obligation, then ICANN and the registrar/registry need to take no further action.

2.3 If the registrar/registry is required by local law enforcement authorities or a court to make changes in its practices affecting compliance with WHOIS-related contractual obligations before any consultation process can occur, the registrar/registry should promptly notify ICANN of the changes made and the law/regulation upon which the action was based.

2.4 The registrar/registry may request that ICANN keep all correspondence between the parties confidential pending the outcome of the WHOIS Proceeding. ICANN will ordinarily respond favorably to such requests to the extent that they can be accommodated with other legal responsibilities and basic principles of transparency applicable to ICANN operations.

2.5 In cases to which the Alternative Trigger applies, the Consultation Step includes a public consultation in which all interested parties can review the written statement submitted in the Notification Step and to comment on all aspects of it. In such cases, ICANN would also consult with the GAC representative (if any) from the country in question, pursuant to section 2.1.2 of the procedure.

Step Three: General Counsel Analysis and Recommendation

3.1 If the WHOIS Proceeding requires changes (whether before, during or after the consultation process described above) that, in the opinion of the Office of ICANN's General Counsel, prevent compliance with contractual WHOIS obligations, ICANN staff may refrain, on a provisional basis, from taking enforcement action against the registrar/registry for non-compliance, while ICANN prepares a public report and recommendation and submits it to the ICANN Board for a decision. Prior to release of the report 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 report. The General Counsel may redact such advice or information from any published version of the report that relates to legal advice to ICANN or advice from ICANN's counsel that in the view of the General Counsel should be restricted due to privileges or possible liability to ICANN. Such a report may contain:

1. A summary of the law or regulation involved in the conflict;
2. Specification of the part of the registry or registrar's contractual WHOIS obligations with which full compliance if being prevented;
3. Summary of the consultation process if any under step two; and
4. Recommendation of how the issue should be resolved, which may include whether ICANN should provide an exception for those registrars/registries to which the specific conflict applies from one or more identified WHOIS contractual provisions. The report should include a detailed justification of its recommendation, including the anticipated impact on the operational stability, reliability, security, or global interoperability of the Internet's unique identifier systems if the recommendation were to be approved or denied.

3.2 The registrar/registry will be provided a reasonable opportunity to comment to the Board. The Registrar/Registry may request that ICANN keep such report confidential prior to any resolution of the Board. ICANN will ordinarily respond favorably to such requests to the extent that they can be accommodated with other legal responsibilities and basic principles of transparency applicable to ICANN operations.

3.3 In cases to which the Alternative Trigger applies, the Board will consider any public comment received on the written statement submitted in the Notification Step as well as any input received from the GAC representative (if any) from the country in question, pursuant to section 2.1.2 of the procedure.

Step Four: Resolution

4.1 Keeping in the mind the anticipated impact on the operational stability, reliability, security, or global interoperability of the Internet's unique identifier systems, the Board will 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 or rejecting the report's recommendations, with or without modifications;
- Seeking additional information from the affected registrar/registry or third parties;
- 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

5.1 The Board's resolution of the issue, together with the General Counsel's report, will ordinarily be made public and be archived on ICANN's 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. The General Counsel may redact such advice or information from any published version of the report that relates to legal advice to ICANN or advice from ICANN's counsel that in the view of the General Counsel should be restricted due to privileges or possible liability to ICANN. In the event that any redactions make it difficult to convey to the public the nature of the actions being taken by the registry/registrar, ICANN will work to provide appropriate notice to the public describing the actions being taken and the justification for such actions, as may be practicable under the circumstances.

5.2 Unless the Board decides otherwise, if the result of its resolution of the issue is that data elements in the registry/registrar's WHOIS output will be removed or made less accessible, ICANN will 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.

Step Six: Ongoing Review

6.1 With substantial input from the relevant registries or registrars, together with all constituencies, ICANN will review the effectiveness of the process annually.

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[1] Whois Task Force 2, Preliminary Report, June 2004; http://gnso.icann.org/issues/whois-privacy/Whois-tf2-preliminary.html

[2] GNSO Council minutes, 28 November 2005; http://gnso.icann.org/meetings/minutes-gnso-28nov05.shtml

[3] Final Task Force Report 25 October, 2005 of the GNSO Whois Task Force; http://gnso.icann.org/issues/tf-final-rpt-25oct05.htm

[4] Board minutes, 10 May, 2006; http://www.icann.org/minutes/minutes-10may06.htm

[5] Reference to 'registries' in this document includes registry operators and sponsoring organizations.