

## Discussion Paper for 1 April 2015 Call

To date, the discussion regarding an appropriate trigger for invoking the WHOIS conflicts procedure has divided registrars and intellectual property representatives. Under the current procedure, a registry or registrar must wait until it is the subject of an enforcement proceeding (“on receiving notification of an investigation, litigation, regulatory proceeding or other government or civil action”) before it can invoke the procedure. Registrar representatives would like to modify the procedure so that they do not have to wait for an enforcement proceeding (and the ensuing costs and potential liability) to trigger the procedure. Similar to the data retention waiver procedure, they propose that an opinion from a law firm would be sufficient to trigger the procedure. Intellectual property representatives appear to oppose modifying the procedure to permit a law firm opinion to act as a trigger.

The procedure’s underlying [policy](#) calls for the development of:

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 the gTLD WHOIS service.

The burden of proving a conflict falls on the registrar or registry. That party must “credibly demonstrate that it is legally prevented by local/national privacy laws or regulations from” complying with WHOIS contractual obligations. In reviewing the current procedure, the key question appears to be whether something short of a notice of an enforcement proceeding can serve as a credible demonstration of legal prevention to comply with the relevant contractual obligations.

For the next call, perhaps it would make sense to discuss whether some combination of a more flexible trigger (i.e., one that does not require notice of an enforcement type proceeding) along with appropriate verification requirements (those that demonstrate legal prevention) would be consistent with the underlying policy. Examples of potential verification requirements are GAC member verification (or in the case where there is no GAC member, verification by relevant government official); opinion by the ICANN General Counsel; evidence of enforcement or intent to enforce by the relevant government agency; and public comment.

Background information for the next call include the [GNSO Policy](#) and the current [Procedure](#).