

GNSO gTLD Registries Stakeholder Group Statement

Issue: IAG Initial Report and Proposed Revisions to the ICANN Procedure for Whois Conflicts with Privacy Laws

Date: 17 November 2015

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

The Registries Stakeholder Group (RySG) appreciates the opportunity to comment on the [IAG Initial Report and Proposed Revisions to the ICANN Procedure for Whois Conflicts with Privacy Laws](#) and wishes to offer the following comments.

1.3.1 Summary of the IAG's agreed preliminary conclusions, page 5

The RySG agrees that a single trigger is not sufficient. Alternative triggers should be included in the Procedure. We commend the IAG on its inclusion of an Alternative Trigger, however we suggest this does not go far enough. The suggested Alternative Trigger may prove insufficient in situations where national law forces the contracted party to remedy after a single violation (examples include a ban on the business operations or monetary fine) without being given an opportunity to first examine possible cures.

The RySG would like to see a second Alternative Trigger allow Contracted Parties to submit to ICANN the English translation of the national law, the text of national law in the local language, and a high level description of the perceived conflict between the national law and the procedures and the related terms of the Registry Agreement (RA) or Registrar Accreditation Agreement (RAA).

1.3.2 Specific topics on which there is not majority support within the WG, page 5

The RySG supports the Legal Written Opinion Trigger.

However, we know of no objective or standard method which allows a law firm's status as "nationally recognized" to be ascertained.

Consequently, rather than talking about "nationally recognized law firm", we suggest the phrase *"a law firm licensed to practice in the country whose national laws or statutes affect the compliance of the Contracted Party triggering the Procedure."*

We also support the proposed Contracted Party Request Trigger with the following edits:

- The requirement to provide *"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"* should be described as recommended, and not mandatory. An affected party may not be able to identify and reach agreement with all relevant parties in a limited time frame.

- *"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"* should be modified to allow a representative of a relevant government agency notwithstanding whether that jurisdiction has a GAC representative. A particular GAC representative might not represent the relevant privacy agency and might not have powers to reflect the privacy agency's opinion/reading of the national law.

Answers to the list of questions requested by authors of the document (page 6)

1. Should the Procedure include a trigger consisting solely of a nationally recognized law firm opinion? If so, why, and if not, why not?

An opinion provided by a nationally recognized law firm may in itself be a trigger. Please note our proposed edits to section 1.3.2 to replace "*nationally recognized law firm*" with a law firm licensed in the jurisdiction in question.

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? Would subjecting the law firm opinion to public comment (including from the relevant GAC member, if any) increase the credibility of the law firm opinion?

Yes we think a law firm opinion can demonstrate conflict with Whois obligations. Please note our proposed edits to section 1.3.2 to replace "*nationally recognized law firm*" with a law firm licensed in the jurisdiction in question. Public comments might not be the correct way to establish the fact of the breach of the national law. The ability to do so in some jurisdictions lies outside of the scope of licensed activities for law firms and belongs to the field of activities of the relevant Telecom and/or Privacy Regulator, Law Enforcement Agencies or Courts.

3. How feasible is it for a contracted party to obtain an opinion from a government agency charged with enforcing its local privacy laws? What role if any should ICANN play in investigating the basis for a trigger?

It might not be possible to obtain the opinion of the relevant governmental agency outside of enforcement of the privacy law. Such enforcement may include penalties such as a ban on operations, or financial punishment. Similarly, the opinion of the relevant agencies might be formed only when the proposed law becomes effective and upon publication, which gives no opportunity to comply with the law in advance without breaching an ICANN contract.

4. Is it appropriate to trust ICANN to investigate whether a request for relief satisfies the grounds to trigger the procedure?

Breach of a national law, or the demonstrable threat of such a breach submitted by a Contracted Party, should be enough to trigger the Procedure. ICANN should not be in a position to refuse to investigate a request for relief.

5. 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?

Once again, the affected Contracted Party should be able to trigger the Procedure if it can provide ICANN with detailed information on the nature of breach and the applicable laws.

Additional Note

Although outside of the scope of the IAG report, the RySG does want to draw attention to the need for a procedure to be developed to allow for ICANN's review and consideration of alleged conflicts between applicable laws and non-WHOIS related provisions of the Registry Agreement.

Article 7.13 of the RA says the following: *"Severability; Conflicts with Laws. This Agreement shall be deemed severable; the invalidity or unenforceability of any term or provision of this Agreement shall not affect the validity or enforceability of the balance of this Agreement or of any other term hereof, which shall remain in full force and effect. If any of the provisions hereof are determined to be invalid or unenforceable, the parties shall negotiate in good faith to modify this Agreement so as to effect the original intent of the parties as closely as possible. ICANN and the Working Group will mutually cooperate to develop an ICANN procedure for ICANN's review and consideration of alleged conflicts between applicable laws and non-WHOIS related provisions of this Agreement. Until such procedure is developed and implemented by ICANN, ICANN will review and consider alleged conflicts between applicable laws and non-WHOIS related provisions of this Agreement in a manner similar to ICANN's Procedure For Handling WHOIS Conflicts with Privacy Law."*

The current absence of a procedure such as described in this article may prevent Registries from being able to fully handle conflicts between the Registry Agreement and national laws that do not specifically relate to the provision of WHOIS data.

Examples of areas where registry operations might be affected include national laws on the physical location of personal data, trans-border transfer of personal data, or national laws on publication of the personal data.

Best regards.

The gTLD Registries Stakeholder Group