



## IPC Comments on the Initial Report of the Implementation Advisory Group's Review of Existing ICANN Procedure for Handling Whois Conflicts with Privacy Law

November 17, 2015

The GNSO Intellectual Property Constituency (IPC) appreciates this opportunity to comment on the Initial Report of the Implementation Advisory Group's (IAG) Review of Existing ICANN Procedure (the "Procedure") for Handling Whois Conflicts with Privacy Law (the "Initial Report"). See <https://www.icann.org/public-comments/iag-whois-conflicts-privacy-2015-10-05-en>.

Consistent with its long standing interest in the Whois conflicts procedure, IPC has previously commented on the issues examined by the IAG, and which are presented in the Initial Report.<sup>1</sup> These comments were submitted as part of a review of the Procedure launched in May 2014, in accordance with Step Six of the Procedure, which calls for annual review of the Procedure. The IAG was formed pursuant to that review, and was mandated to consider the need for changes to how the procedure is invoked and used.

It is important to note that the mandate of the IAG did *not* include consideration of the policy which underlies the Procedure. In particular: "Any recommended changes made will need to be in line with the Procedure's underlying policy, which was adopted by the GNSO Council in 2005. As a result, recommended changes to the implementation of the procedure, if any, will be shared with the GNSO Council to *ensure that these do not conflict with the intent of the original policy recommendations.*"<sup>2</sup> That policy, which was adopted by the Board without dissent, requires that in order to invoke the procedure, the registrar or registry is required to "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."<sup>3</sup>

Notwithstanding this clear directive, the Initial Report includes two Minority Views attacking the merits and validity of the underlying policy.<sup>4</sup> IPC reiterates its view that the policy which underlies the Whois conflicts procedure is a sound and successful example of the bottom-up, multi-stakeholder process in action. It requires that the Procedure be narrowly limited to those circumstances where the contracted party is in an unequivocally clear position of not being able to legally comply with its contractual obligations. This is the standard endorsed by the GNSO Council and Board taking into account the strong and broad public interest in the accountability and transparency of the Whois framework. The focus of the IAG's work and eventual recommendation must remain targeted to finding potential

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<sup>1</sup> See <http://forum.icann.org/lists/comments-whois-conflicts-procedure-22may14-en/pdfIJGWTXdiv6.pdf> and [http://ipconstituency.org/PDFs/IPC Reply Comments on ICANN Staff Paper on Whois Conflicts Aug 1 2014.pdf](http://ipconstituency.org/PDFs/IPC_Reply_Comments_on_ICANN_Staff_Paper_on_Whois_Conflicts_Aug_1_2014.pdf).

<sup>2</sup> See <https://community.icann.org/display/WNLCI/WHOIS+and+national+law+conflicts+IAG+Home>

<sup>3</sup> See <http://gnso.icann.org/en/issues/tf-final-rpt-25oct05.htm>.

<sup>4</sup> See Appendix 4 of the Initial Report: Statements of Christopher Wilkinson and Stephanie Perrin.

improvements to the Procedure, in conformity with the underlying policy. The IAG is clearly not the appropriate venue for those seeking to undermine the merits of the existing policy, and we caution against the hijacking of the IAG's resources and agenda to further that cause when there are other routes for supporters of that position to follow, if they so choose.

IPC commends the IAG for its efforts to find ways to improve the effectiveness of the procedure in line with the original policy recommendations. IPC's comments in response to the specific questions below are informed by its strong view that the underlying policy is sufficiently robust to permit the construction of a balanced and effective Procedure to address conflicts between national law and Whois obligations, and the fact that the Procedure has not been invoked reflects the health of the existing system.

1. Should the Procedure include a trigger consisting solely of a nationally recognized law firm opinion? If so, why, and if not, why not?
  - a. It should not. The opinion of a nationally recognized law firm is clearly not sufficient by itself to credibly demonstrate that a party is legally prevented from complying with its Whois obligations. The interpretation of specific laws by a law firm, whether nationally recognized or not, does not sufficiently demonstrate that the contracted party is "legally prevented" by national laws from complying with its Whois obligations since such opinions may be subjective in nature and reflect an interpretation of the law in a light most favorable to the law firm's client that is requesting and paying for it. Because of the nature of legal advocacy for the interests of the client, there is an inherent bias in such opinions that would skew the analysis towards construing the law in a way most likely to lead to the grant of a waiver on behalf of a client. Therefore, such opinions by definition are inherently biased and therefore fall short of a credible demonstration of neutral legal analysis. Even if a law firm is instructed by a neutral third party, a firm's advice might well be colored by the interests of its other clients. We also note that the meaning of "nationally recognized" is not clear. To the extent that this refers to a national registration or license requirement, the consequent "recognition" is highly unlikely to operate as a statement of the firm's competence to opine on the issue in question or its objectivity.
  - b. IPC notes that this lower threshold, which is contained in Section 2 of the Data Retention Specification of the 2013 RAA, has resulted in inconsistent application, a lack of clarity as to the legal basis of the request, and, as a result, a lack of transparency regarding the standard for the granting of such waivers.
  - c. Even independent legal analysis would not provide the required level of certainty to demonstrate the required legal prevention. The underlying policy requires not just the possibility of a conflict, but a credible demonstration of legal prevention. For that, IPC takes the view that more should be required in the form of a clear position on the part of an entity charged with enforcing relevant national laws that the contracted party would be in violation of such laws as a result of complying with its Whois obligations.
  - d. IPC recalls and agrees with the earlier comments of the European Commission to the extent that they emphasize that "the decision of granting of an exemption to the

implementation of the contractual requirements concerning the collection, display and distribution of Whois data should remain exclusively based on the most authoritative sources of interpretation of national legal frameworks.”<sup>5</sup>

- e. The underlying policy refers specifically to potential conflicts between “national/local” privacy laws and Whois obligations. IPC notes the Minority View calling for recognition of potential conflicts on a regional basis. Once again, this is incompatible with the underlying policy, not only because that policy specifically refers to national/local laws, but also because in reality, such laws are enforced on a national or local basis, and therefore to be credible a demonstration would require a clear nexus to the local/national law, and not interpretation by entities that lack enforcement authority.
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?
    - a. No. An opinion from a nationally recognized law firm could not amount to a credible demonstration that a party is legally prevented from complying with its Whois obligations, for the reasons outlined above.
    - b. Subjecting such an opinion to public comment would not remedy this deficiency. While additional input from the public and/or the relevant GAC member might be informative, it would simply compound one opinion with additional opinions, from entities and parties which are even less likely to be in a position to determine whether a bar to compliance in fact exists.
    - c. While IPC takes the view that public comment would not adequately or knowledgeably address the adequacy or insufficiencies of a law firm opinion, the opportunity for public comment remains an essential part of the process, after the Procedure has been triggered. Given the interests that would be impacted by any waiver, it is essential to provide a full opportunity for public comment in any case in which ICANN proposes to release a registrar or registry from any aspect of its Whois obligations. ICANN should also commit to publishing an objective analysis of such comments, and a thorough explanation of the reasons why all such comments are either accepted or rejected in reaching ICANN’s final decision with respect to a Whois conflicts proceeding.
    - d. The existing Procedure comes closest to meeting the “credible demonstration” standard required by the underlying policy by requiring specific action in the form of an investigation, litigation, regulatory proceeding or other government or civil action. An opinion from a law firm, whether supplemented by input from the public or relevant GAC member would impose a significantly looser standard, one which does not come close to complying with the underlying policy.

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<sup>5</sup> See <http://forum.icann.org/lists/comments-whois-conflicts-procedure-22may14-en/pdfllqblYdaYl.pdf>.

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?
  - a. A government agency charged with interpreting and enforcing local privacy laws would be better placed to provide a view on whether there would be a conflict between a contracted party's Whois obligations and local laws, such that the contracted party would be legally prevented from complying.
  - b. It should be feasible for a contracted party to request input from a government agency charged with enforcement of local privacy laws. For example, the UK data protection authority offers an audit facility to verify whether or not a company or organizations data protection procedures are compliant with national law.<sup>6</sup> Another example is that of the Spanish Data Protection Authority, which issued an advisory opinion in 2009 with regard to a change in the registry agreement for .cat regarding Whois. So the charge by some that DPAs and other enforcement authorities do not provide such input is not borne out in reality. In the event that a contracted party is unable or unwilling to provide an authoritative opinion on the existence of a conflict between local privacy laws and a contracted party's Whois obligations, this would cast doubt on the existence of any conflict that would result in the legal prevention of a contracted parties' compliance.
4. Is it appropriate to trust ICANN to investigate whether a request for relief satisfies the grounds to trigger the procedure?
  - a. An investigation by ICANN would not be sufficient to establish a credible demonstration of a contracted party being legally prevented from complying with its Whois obligations, and would therefore not meet the requirements of the underlying policy.
  - b. A framework that appoints ICANN as an arbiter of whether a collection of information submitted by a registrar/registry or group of registrars/registries satisfies the grounds for triggering the procedure would amount to an open-ended and imprecise means of defining what an appropriate standard might be. In order to adequately balance the interests at stake, and ensure that safeguards are in place to satisfy the underlying policy, it is important that the elements required to trigger the Procedure are clearly described therein, and that ICANN is not required to make a judgment call based on a collection of evidence that, taken together, may or may not meet the required standard.
  - c. ICANN has an important role to play, however, once the Procedure has been triggered, by evaluating the information submitted by the contracted party, which would include (as per the current Procedure) obtaining input from the relevant GAC representative (pursuant to advice from the GAC), and engaging the Office of ICANN's General Counsel, to evaluate the dissonance between requirements of local laws and contractual provisions, with a view recommending an appropriate resolution.

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<sup>6</sup>See <https://ico.org.uk/for-organisations/improve-your-practices/audits>.

- d. With regard to the proposed “Contracted Party Request”, which places ICANN in the position of determining whether the contracted party had met the required standard for triggering the Procedure based on a collection of evidence and outside input, IPC refers to its comments in response to question 4. IPC notes that the GNSO Council and ICANN Board specifically defined a policy and outlined the parameters of a procedure which would not place ICANN in the position of determining whether a conflict exists. Rather, it clearly contemplates ICANN’s role in the process as beginning only once the Procedure has been triggered. In particular, the Consensus Policy Recommendation identifies the first goal of the procedure as “Ensuring that ICANN staff is informed of a conflict at the earliest appropriate juncture.” It does not contemplate ICANN playing a substantive role in the process of making a credible demonstration that a conflict exists. The requirements set forth for registrars and registries have been set purposefully, and to adjust the framework to enable ICANN to play an adjudicating role prior to the Procedure being triggered would be facially inconsistent with the underlying policy.<sup>7</sup> IPC notes that the proposed “Contracted Party Request” includes a non-mandatory requirement for the registrar or registry to submit written support/approval from a competent data protection agency with enforcement authority. The non-mandatory nature of this requirement is the most significant difference between this proposal and the Alternative Trigger, which is centered on the input from a government agency with enforcement authority. If this requirement were made mandatory, it is submitted that this proposal would overlap with the Alternative Trigger, and therefore come closer to complying with the underlying policy. However, the Alternative Trigger is a clearer means of reaching the same destination.
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?
  - a. IPC supports the Proposed Alternative Trigger set forth in the Initial Report, which received majority support. The Alternative Trigger would relax the current trigger in the Procedure, but without straying from the required “credible demonstration” standard, by allowing the contacted party to seek a written statement from the relevant government agency charged with enforcing local privacy laws, without having to wait for a proceeding or action to be instituted.
  - b. In that way, the source of information regarding the potential conflict would come from the most authoritative source, while reducing the burden on the contracted party.
  - c. The Alternative Trigger would also assist in identifying the specific provision that was potentially in conflict with existing law, and the fact that the opinion was coming from the government entity responsible for enforcing the relevant local laws in question would satisfy the requirement that the contracted party demonstrate that it is “legally prevented” from complying with its obligations.

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<sup>7</sup> See <http://gns0.icann.org/en/issues/whois-privacy/council-rpt-18jan06.htm>.

- d. While IPC still supports the Procedure in its current form, it regards the Alternative Trigger as a reasonable accommodation of concerns that requiring a contracting party to wait until it is subjected to an action, proceeding or investigation is too limiting. (On the other hand, since no contracting party has ever had to invoke the proceeding, the question remains whether such concerns are wholly theoretical.)

In summary, IPC supports the existing policy and Procedure, but is open to the accommodation of concerns through the Alternative Trigger. For the reasons expressed above and in prior comments, IPC does not support the Written Legal Opinion Trigger or Contracted Party Request proposals, since they would clearly fall short of the requirements and spirit of the underlying policy.

IPC thanks ICANN for its consideration of these comments.

Respectfully submitted,

Intellectual Property Constituency