



CENTRE FOR COMMUNICATION GOVERNANCE AT NATIONAL LAW UNIVERSITY, DELHI

Comments on the Initial Report of the IAG Review of Existing ICANN Procedure for Handling WHOIS Conflicts with Privacy Laws

By Aarti Bhavana and Pushan Dwivedi¹

ICANN has recognised the potential for conflicts between its Whois contracts and local privacy laws when it adopted a [procedure](#) for dealing with such conflicts.

This IAG report mainly focuses on the issue of triggers, through the question- What triggers would be appropriate for invoking the procedure? The current procedure only recognises one trigger to begin the procedure to resolve the conflict with privacy law: “notification of an investigation, litigation, regulatory proceeding or other government or civil action that might affect its compliance.”² IAG recommends, through majority support, an Alternative Trigger under which a contracted party could seek a written statement from a governmental agency indicating that the WHOIS obligation conflicts with national law, and submit this statement to ICANN. Other trigger options which only enjoy partial support from the IAG are: (1) written legal opinion from a nationally recognised law firm, (2) written legal opinion subjected to a public comment process and (3) contracted party request.

We agree that the present procedure requiring notification of a proceeding is an unreasonably high standard to trigger the conflicts process. Receiving such an official notification can take time, and is outside the control of contracted parties, who are forced to wait for the notification before taking any action. However, we disagree with the alternatives provided by IAG and

¹ Research Fellows at the Centre for Communication Governance.

² Step One: Notification of Whois Proceeding, available at <https://www.icann.org/resources/pages/whois-privacy-conflicts-procedure-2008-01-17-en>.

broadly agree with the minority views expressed by Christopher Wilkinson and Stephanie Perrin, as has been elaborated below:

- A. We support Christopher Wilkinson’s alternative Whois policy³ to the extent that we agree that ICANN must adopt and universally apply international best practices for privacy and data protection, instead of attempting to assess and comply with different local or national laws in different jurisdictions. ICANN being a technical body responsible for the coordination of the domain name system, will be over-extended in terms of capacity and resources if it takes on the task of determining the circumstances in which a registrar or registry can comply with the local privacy laws. Further, such a task would fall outside its mandate. The most suitable set of norms for ICANN to apply would be those emerging from international legal institutions. In this context, we recommend that the contractual obligations in connection with the Whois policy should incorporate norms from the United Nations General Assembly Resolution 68/167 on Right to Privacy in the Digital Age,⁴ and should be updated in view of any upcoming relevant reports by the UN Special Rapporteur on the Right to Privacy. Any additional detailed norms that may be necessary for clarity may be incorporated from the EU Data Protection Directive.⁵
- It is our recommendation that these practices be adopted, and suitably modified, from the United Nations General Assembly Resolution 68/167, the EU Data Protection Directive, and the Guidelines issued by the Article 29 Data Protection Working Party of the European Union towards the implementation of ‘Right to be Forgotten’⁶ (contained in Article 12 of the EU Data Protection Directive). The guidelines by Article 29 Data Protection Working Party provide valuable guidance on instances where privacy and data protection norms should allow for disclosure of protected information for specific, limited exceptions.

³ Appendix 4 - Minority Views, p 16, available at <http://whois.icann.org/sites/default/files/files/iag-review-whois-conflicts-procedure-1-4-appendices-05oct15-en.pdf>

⁴ United Nations General Assembly Resolution 68/167, available at http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/68/167.

⁵ Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31995L0046>.

⁶ Guidelines on the Implementation of the Court of Justice of the European Union judgment on “Google Spain and inc v. Agencia Española de Protección de Datos (aepd) and Mario Costeja González” c-131/12 available at http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2014/wp225_en.pdf.

The 2013 Registrar Accreditation Agreement (RAA) has been criticised for being in violation of local privacy laws.⁷ Given that the obligations set out in the RAA will affect all fresh contracts with registrars, as well as renewed contracts, we find it imperative to reconsider the functioning of the entire Whois Policy in its current form within the RAA.

- B. To minimise the likelihood of conflict with privacy laws, we have recommended raising the standard to the best global practices on privacy. We also recommend a periodic review and update of the Whois specifications in the RAAs to ensure that such conflict remains unlikely. This model will ensure that ICANN respects internationally recognised human rights equally and consistently around the world, and does not create frameworks for differential protection of human rights in different countries.

Consequently, we also recognise that an alternative Whois policy will take time to develop, and in the meantime, the current conflicts procedure needs to be improved. With that in mind, these are our comments on the various proposed triggers:

I. Proposed Alternative Trigger: (detailed in [Appendix 1](#))

While this trigger is an improvement on the existing procedure, it requires individual requests for exemptions on the basis of a written statement from a governmental agency. These statements may not be easy to acquire, as governmental agencies are not always easily accessible, making it difficult for the contracted party. Further, requiring individual requests for exemptions is not a logistically sound option. If an exemption has been granted for a particular conflict with local privacy laws, it should automatically apply to all contracting parties that fall within the jurisdiction of the local law. We also support the proposal that regional laws on privacy must also be recognised, not just national laws, making the text ‘applicable *local* law’⁸ appropriate.

⁷ European Data Protection Supervisor’s letter to ICANN, available at https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Comments/2014/14-04-17_EDPS_letter_to_ICANN_EN.pdf; Article 29 Working Party’s Letter to ICANN, available at http://ec.europa.eu/justice/data-protection/article-29/documentation/other-document/files/2014/20140108_letter_icann.pdf; See also Zalnieriute and Schneider, ‘ICANN’s procedures and policies in the light of human rights, fundamental freedoms and democratic values’, Council Of Europe DGI(2014)12, available at https://www.coe.int/t/information/society/Source/DGI_2014_12E%20Report%20ICANN%20and%20Human%20Rights%20updated%208%20Oct%202014.pdf.

⁸ *ibid* at 14.

II. Written Legal Opinion Trigger: (Dual Trigger, as detailed in [Appendix 2](#))

An additional trigger has been proposed by some, which requires the contracting parties to provide written legal opinion from a nationally recognised law firm stating that there exists a conflict between the contractual agreement and existing national laws.⁹ We support this option as it provides an additional avenue for triggering the conflicts process. However, some clarity is needed on what exactly constitutes a ‘nationally recognised law firm’: there are thousands of law firms in some countries. In this case, would a legal opinion from any one of them trigger the conflict procedure? Would this include opinions from practicing independent counsels, or only firms? We reiterate our concern about requiring individual requests for exemptions and recommend that if an exemption has been granted for a particular conflict with local privacy laws, it should automatically apply to all contracting parties that fall within the jurisdiction of the local law. We also support the proposal that regional laws on privacy must also be recognised, not just national laws, making the text ‘applicable *local* law’¹⁰ appropriate.

III. Contracted Party Request as a Trigger:¹¹

Of the three proposed triggers, we find this to be most appropriate stand-in proposal, until the international best practices on privacy and data protection are adopted. This allows a contracted party to trigger the conflicts process by presenting to ICANN a request describing the conflict, along with support from other affected parties. This trigger takes into account the fact that contracted parties should not need to go through such a long and difficult process to prove the locally applicable law, as required by the other proposals.

In light of our comments above, these are the answers to the specific questions asked by the IAG:

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

No. A law firm opinion is not credible enough to constitute the **sole** trigger. Conflicting opinions between different law firms, in addition to the volume of law firms in a country, makes this an ill-suited measure.

⁹ Initial Report on IAG Review of Existing ICANN Procedure for Handling WHOIS Conflicts with Privacy Laws, p 12, available at

<http://whois.icann.org/sites/default/files/files/iag-review-whois-conflicts-procedure-05oct15-en.pdf>.

¹⁰ Appendix 4 - Minority Views, p 14, available at <http://whois.icann.org/sites/default/files/files/iag-review-whois-conflicts-procedure-1-4-appendices-05oct15-en.pdf>

¹¹ Initial Report on IAG Review of Existing ICANN Procedure for Handling WHOIS Conflicts with Privacy Laws, p 13, available at

<http://whois.icann.org/sites/default/files/files/iag-review-whois-conflicts-procedure-05oct15-en.pdf>.

- 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, a law firm opinion can credibly demonstrate that a party is prevented from complying with the contractual obligations because of a conflict with the local law. However, this would be more appropriate as one of many trigger options available to the contracted parties. We also reiterate the need for clarifying the meaning of ‘nationally recognised law firm’, as we have detailed above (under part II on page 4).

- 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 is not feasible for a contracted party to obtain an opinion from the relevant governmental agency. First, government agencies are not always easily approachable. Second, they may be unwilling to provide a written statement explaining why the contractual obligations conflict with the local privacy laws. There should be no need to involve governmental enforcement agencies merely to state the applicable local law.

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

No, it is not appropriate to trust ICANN to determine if a request for relief fulfills the ground to trigger the conflict procedure. A private organisation should not be tasked with the obligation to protect civil liberties, including privacy and data protection, through establishment of relevant criteria and procedures.¹²

- 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?**

¹² Frank La Reu, *The Advisory Council to Google on the Right to be Forgotten*, (6th February, 2015) p 29, available at <https://www.google.com/advisorycouncil/>.

We support Christopher Wilkinson's proposal of an alternative Whois policy, wherein ICANN adopts international best practices on privacy and data protection. This has been detailed above (under point A on page 2).