



## **Preliminary Comments of the GNSO Intellectual Property Constituency (IPC)**

July 3, 2014

The GNSO Intellectual Property Constituency (IPC) appreciates this opportunity to comment on the review process for the existing ICANN Procedure for Handling Whois Conflicts with Privacy Law. See <https://www.icann.org/public-comments/whois-conflicts-procedure-2014-05-22-en>.

What follows are preliminary IPC comments. Because this public comment process substantially overlaps in time with more than a dozen other such ICANN public comment processes, and also with preparations for and participation in an ICANN international meeting, it simply was not feasible to carefully review, analyze, and develop a full consensus response to the posting by today's initial comment deadline, even though that deadline was extended past the end of the London meeting. Accordingly, IPC reserves the right to supplement these comments during the reply round.

IPC has a long-standing interest in the Whois conflicts procedure. We played a leading role in the GNSO Council recommendation in 2005 that established the policy that led to adoption of the procedure; participated actively in development of the procedure itself; and have closely monitored its implementation. We believe that the procedure is a successful example of the bottom-up, multi-stakeholder process in action, and that review of the procedure should take that history into account.

The policy involved here dictates that any procedure to enable contracted parties to seek to avoid their contractual obligations to ICANN regarding Whois must remain narrowly focused and reserved for the most compelling circumstances. The strong and broad public interest in the accountability and transparency that a sound Whois system provides to the DNS must be respected; and ICANN should seek to administer its contractual relationships consistently and fairly across the board. A Whois conflicts procedure that lacks rigor or strong standards risks undermining these vital interests.

In particular, the Whois conflicts procedure should continue to be focused exclusively upon the specific situation identified in the unanimous recommendation of a GNSO task force which led to the 2005 GNSO council resolution, approved by the Board in 2006 without dissent: "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." <http://gns0.icann.org/en/issues/tf-final-rpt-25oct05.htm> (emphasis added) While the procedure adopted to respond to this situation should of course be subject to appropriate periodic review, IPC would be seriously concerned if the procedure were loosened to allow for its



invocation in other situations. This includes those circumstances in which the required “credible demonstration” of the requisite “legal prevention” is based solely on an abstract, hypothetical opinion, not anchored either in a concrete dispute or in an actual or threatened legal proceeding, but produced solely to support a waiver request.

In this regard, IPC’s preliminary response to question 1.3 is that the much lower threshold standard contained in the Data Retention Specification of the 2013 RAA should not be engrafted onto the Whois Conflicts Procedure. IPC observes that the looser standard found in the 2013 RAA has already caused problems. In the first three cases in which data retention waiver requests were presented to the community, there were significant problems with the legal opinions provided, leaving murky the asserted legal basis for the request; the specific obligations from which relief was sought; and/or the reasoning under which the asserted legal conflict would be resolved if the requested relief were granted. See <http://forum.icann.org/lists/comments-blacknight-07may14/msg00001.html> ; <http://forum.icann.org/lists/comments-nameweb-21mar14/msg00002.html> ; <http://forum.icann.org/lists/comments-ovh-sas-27jan14/msg00000.html>. In our view, the record compiled thus far on data retention waiver requests weighs strongly against a relaxation of the threshold for invoking the Whois conflicts procedure. That record also raises the issue of the value of independent legal analysis as part of the conflicts procedure.

Our final preliminary comment, in response to question 4.1, is that 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 significant 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. (We note that no such analyses or explanations were provided in the three public comment periods regarding data retention waiver requests, noted above, which raises serious concerns for accountability and transparency.)

IPC thanks ICANN for its consideration of these comments and looks forward to providing further input later in the process.

Respectfully submitted,

Intellectual Property Constituency of the GNSO

by Steve Metalitz, Vice President