Whois Conflicts with Privacy Laws --- Chronology and Summary

On Oct. 25, 2005, a Combined Whois Task Force convened by the GNSO council to (among other things) “determine how to resolve differences … when there are conflicts between a registrar's or registry's legal obligations under local privacy laws and their contractual obligations to ICANN,*”* issued a report. The Task Force recommended as a consensus policy that ICANN “develop and publicly document 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 WHOIS.” The Task Force report went on to approve “well-developed advice” for such a procedure. The Task Force’s report was approved by the GNSO council on November 28, 2005, and was reported to the ICANN board on January 18, 2006. The board adopted the consensus policy on May 10, 2006.

The consensus policy (which remains in force) adopts goals for the conflicts procedure, including early notice to ICANN staff; “ resolving the conflict, if possible, in a manner conducive to ICANN's Mission, applicable Core Values and the stability and uniformity of the Whois system;” authorizing exceptions to contractual obligations for specific conflicts if they cannot otherwise be resolved; and preserving flexibility.

A staff-developed procedure for implementing the consensus policy wasadopted effective Jan. 17, 2008. The procedure, which is also currently in force, sets out a six-step process, that begins with notification to ICANN staff of an action that “might affect [a contracted party’s] compliance with the provisions of [its] contractual agreement with ICANN.” The next step is a consultation process that “seek[s] to resolve the problem in a manner that preserves the ability of the registrar/registry to comply with its contractual WHOIS obligations to the greatest extent possible.” In the third step, General Counsel Analysis and Recommendation, ICANN can provisionally refrain from enforcing certain contract provisions while the General Counsel prepares and posts a report to the Board that summarizes the conflict, the consultation process, and a recommended resolution. Board action on the report (as well as the justification for it) will “ordinarily be made public,” along with related materials. The sixth step calls for “ongoing review” of the effectiveness of the procedure.

Although the procedure calls for annual review of the process, in fact no such review was formally undertaken before 2014. An Implementation Advisory Group formed to assist staff in this review submitted an initial report on October 5, 2015, which focused primarily on the first step of the procedure, and specifically on whether the trigger for invoking the procedure should be modified. The IAG reached preliminary agreement on expanding the existing trigger so that, even in the absence of “an investigation, litigation, regulatory proceeding or other government or civil action that might affect its compliance” with contractual obligations, a contracted party could invoke the procedure based on “a written statement from the government agency charged with enforcing its data privacy laws indicating that a particular WHOIS obligation conflicts with national law.” Two other proposed expanded triggers failed to achieve majority support within the IAG. Although public comments have been received on the IAG initial report, no final report has been issued to date.