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Initial Report on the Implementation Advisory Group Review of Existing ICANN Procedure for Handling WHOIS Conflicts with Privacy Laws

STATUS OF THIS DOCUMENT

This is the Initial Report of the Implementation Advisory Group to Review Existing ICANN Procedure for Handling WHOIS Conflicts with Privacy Laws, prepared by ICANN staff for public comment and submission to the GNSO Council on XX July 2015. ICANN staff will prepare a Final Report following the IAG's review of the public comments received on this Initial Report.

SUMMARY

This report is submitted to the GNSO Council and posted for public comment by the Implementation Advisory Group to Review Existing ICANN Procedure for Handling WHOIS Conflicts with Privacy Laws.

Some members of the IAG have expressed strong reservations as to the underlying GNSO WHOIS policy and consider that it is not appropriate to tweak the implementation of the existing policy (that has been in existence for more than a decade, albeit not implemented) whereas basic changes to the policy are required.

These reservations are summarised in Appendix 3 to this report.

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3 Executive Summary

1.1 Background

In November 2005, the Generic Names Supporting Organization (GNSO) [concluded a policy development process \(PDP\)](#) on WHOIS conflicts with privacy law which recommended that “In order to facilitate reconciliation of any conflicts between applicable laws for privacy and data protection and applicable provisions of the ICANN contract regarding the collection, display and distribution of personal data via the gTLD WHOIS service, ICANN should:

- 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 applicable 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.
- Create goals for the procedure which include:
 - Ensuring that ICANN staff is informed of a conflict at the earliest appropriate juncture;
 - Resolving the conflict, if possible, in a manner conducive to ICANN's Mission, applicable Core Values, and the stability of the WHOIS system;
 - Providing a mechanism for the recognition, if appropriate, in circumstances where the conflict cannot be otherwise resolved, of a derogation to contractual obligations to those registries/registrars to which the specific conflict applies with regard to collection, display and distribution of personally identifiable data via WHOIS; and
 - Preserving sufficient flexibility for ICANN staff to respond to particular factual situations as they arise”.

The ICANN Board adopted the recommendations in May 2006 and the final Procedure was made effective in January 2008. Although to date no registrar or registry operator has formally invoked the Procedure, concerns have been expressed both by public authorities as well as registrars and registry operators concerning potential conflicts between WHOIS contractual obligations and local law.

Given that the WHOIS Procedure has not been invoked and yet numerous concerns have arisen from contracted parties and the wider community, ICANN launched a review as provided for in Step Six of the Procedure, which calls for an annual review of the Procedure's effectiveness. The [review](#) was launched with the publication of a paper for public comment on 22 May 2014. The paper outlined the Procedure's steps and invited public comments on a series of questions. Following review of the public comments received, this Implementation Advisory Group (IAG) was formed to consider the need for changes to how

the Procedure is invoked and used. A few common themes were discerned from some of the suggestions in the public comments, which may allow for changes to implementation of the Procedure in line with the underlying policy.

1.2 Deliberations of the Implementation Advisory Group

The IAG started its work on 7 January 2015. The IAG conducted its deliberations primarily through monthly conference calls, in addition to discussions on its mailing list. Section 5 provides an overview of the deliberations of the WG conducted by conference call as well as through e-mail threads.

The IAG's work is based on the issues and questions laid out in its [Mission and Scope](#). It should be noted that the IAG spent the majority of its deliberations on the second issue, "Trigger: What triggers would be appropriate for invoking the Procedure?."

The Mission and Scope of the IAG has proved to be unduly restrictive and presupposes that the existing WHOIS policy is retained whereas it is clearly in breach of applicable laws regarding privacy and data protection .

The IAG's findings and initial recommendations for each of these Charter questions can be found in full in Section 7 of this Initial Report. They are also summarized in Section 1.3 below.

1.3 IAG Preliminary Recommendations

The following sub-sections provide a summary of the IAG's preliminary conclusions as follows:

- Section 1.3.1 contains all the IAG's preliminarily-agreed recommendations;
- Section 1.3.2 contains the IAG's conflicting views regarding the appropriate triggers for invoking the procedure.

The full text of all of the IAG's preliminary conclusions, including any supplemental notes, are set out in detail in Section 7. Square brackets in this document generally indicate alternative formulations on the same topic that are under consideration by the IAG. Commenters are encouraged to specify which formulation they prefer, and why.

While community input is being sought on all aspects of this report, including the IAG's preliminarily agreed recommendations, the IAG would particularly welcome specific public comments on those of its deliberations, proposals and options for which there is not majority support.

1.3.1 Summary of the IAG's agreed preliminary conclusions

The IAG has reached preliminary agreement on the following recommendation:

Proposed Alternative Trigger

- Currently, the [Procedure](#) recognizes only one trigger for purposes of seeking relief from the conflict of a WHOIS obligation and national privacy law. The registry/registrar must have received “notification of an investigation, litigation, regulatory proceeding or other government or civil action that might affect its compliance.”
- Under the “Alternative Trigger” proposal, a contracted party would not have to wait to receive notification of a proceeding against it. Rather, it could seek a written statement from the governmental (regional or national) agency charged with interpreting and implementing its data privacy laws indicating that a particular WHOIS obligation conflicts with national law and then submit that statement to ICANN.

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

Written Legal Opinion Trigger

- A number of IAG members supported the addition of a trigger consisting of a written legal opinion from a nationally recognized law firm. The firm’s opinion must state that national laws or statutes in the country of incorporation of a contracted party will affect its compliance with the provisions of the Registrar Accreditation Agreement or other contractual agreement with ICANN dealing with the collection, display or distribution of personally identifiable data via WHOIS.

Contracted Party Request Trigger

- Some IAG members supported a trigger under which in response to a request from a contracted party, ICANN would investigate whether the request for relief is adequate for triggering the procedure. The requesting party would need to present ICANN with:
 - A request describing the legal conflict and why it’s impossible to find a legal alternative including registrant consent or privacy/proxy services (mandatory)
 - Written support by all other affected registries and/or registrars or justification for why they are the only affected party (mandatory)
 - Written support/approval from a relevant governmental privacy agency (if one exists) (highly recommended but not mandatory)
 - 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 (mandatory)

ICANN’s investigation of the grounds for the request would include but not be limited to seeking input from the GAC, law enforcement and other interested parties; posting the request for 45 days to allow parties to file objections and requiring resolution of any objections. ICANN may also seek outside expert advice to help inform a final decision.

Public comment is therefore specifically invited on the following questions:

1. Should the Procedure include a trigger consisting solely of a nationally recognized law firm opinion? If so, why, and if not, why not?
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?
3. How feasible is it for a contracted party to obtain an opinion from a governmental agency charged with interpreting and implementing its privacy laws? What role if any should ICANN play in investigating the basis for a trigger?
4. Is it appropriate to trust ICANN to investigate whether a request for relief satisfies the grounds to trigger the procedure?
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?

1.3.4 General

The IAG welcomes community input as to whether its recommendation to add to the Procedure an Alternative Trigger (in the absence of a Whois proceeding) should be adopted in its final report. The IAG also welcomes comment on the other triggers that did not garner majority support within the working group.

1.5 Conclusions and Next Steps

The IAG aims to complete this section of the report following its review of public comments received on this Initial Report.

4. Objective and Next Steps

This Initial Report on of the Implementation Advisory Group to Review Existing ICANN Procedure for Handling WHOIS Conflicts with Privacy Laws was prepared as required by the IAG's [Statement of Work](#). The Initial Report will be posted for public comment for 40 days. The comments received will be analyzed by the IAG as part of its development of a Final Report to be considered by the GNSO Council for further action. N.B. Some of the IAG participants have reservations as to the competence and objectivity of the GNSO to address this issue and suggest that a different ICANN procedure be engaged to this effect.

5. Background

Process Background

- In November 2005, the Generic Names Supporting Organization (GNSO) concluded a [policy development process \(PDP\) on WHOIS conflicts with privacy law](#) which recommended that “In order to facilitate reconciliation of any conflicts between local/national mandatory privacy laws or regulations and applicable provisions of the ICANN contract regarding the collection, display and distribution of personal data via the gTLD WHOIS service, ICANN should:
 - 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.
 - Create goals for the procedure which include:
 - Ensuring that ICANN staff is informed of a conflict at the earliest appropriate juncture;
 - 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;
 - Providing a mechanism for the recognition, if appropriate, in circumstances where the conflict cannot be otherwise resolved, of an exception to contractual obligations to those registries/registrars to which the specific conflict applies with regard to collection, display and distribution of personally identifiable data via WHOIS; and
 - Preserving sufficient flexibility for ICANN staff to respond to particular factual situations as they arise”.
- The ICANN Board adopted the recommendations in May 2006 and the final Procedure was made effective in January 2008.
- However, meanwhile, the proposed procedure has never been invoked, whereas many concerns have been expressed to the effect that the procedure is inconsistent with applicable laws.
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Issue Background

- Given that the WHOIS Procedure has not been invoked and yet numerous concerns have arisen from contracted parties and the wider community, ICANN launched a review as provided for in Step Six of the Procedure, which calls for an annual review of the Procedure's effectiveness.
- The [review](#) was launched with the publication of a paper for public comment on 22 May 2014. The paper outlined the Procedure's steps and invited public comments on a series of questions. Following analysis of all public comments received, the IAG was formed to consider possible changes to how the Procedure is invoked and used. Several common themes could be discerned from among some of the suggestions in the public comments, which may allow for changes to implementation of the Procedure in line with the underlying policy.

6. Approach taken by the Working Group

4.1 Working Methodology

- The IAG began its deliberations on 7 January 2015. It conducted its work primarily through [monthly conference calls](#), in addition to e-mail exchanges on its mailing list. All of the IAG's meetings are documented on its [wiki homepage](#), including its mailing list, draft documents, and background materials.
- The IAG originally intended to address the issues in the order in which they appeared in the [Charter](#). Those issues are as follows:
 - Process: Should the Procedure be revised to allow for invocation prior to contracting?
 - If adopted, how would that alter the contracting process?
 - What parties would be most appropriate to include at this early stage of the Procedure?
 - Trigger: What triggers would be appropriate for invoking the Procedure?
 - Would evidence from a data protection authority that the contract is in conflict with national laws be sufficient to trigger the Procedure? If so, how would ICANN define which data protection authority is an acceptable authority? Would the authority have to be a nationally representative body? Should a regional body's opinion carry the same weight as a national or local authority?
 - Similarly, would an official opinion from a government agency provide enough evidence? If so, which agencies would be most appropriate? Would it have to be an agency tasked with data protection? What about a consumer trust bureau or treasury department that includes consumer protections in its mandate? Or would a foreign

ministry provide the best source of information? Which bodies would be considered authoritative enough to provide a creditable opinion?

- Would evidence of a conflict from ICANN-provided analysis provide sufficient information to invoke the Procedure? What type of evidence should this analysis cite?
- If the Procedure allowed for a written opinion from a nationally recognized law firm to provide sufficient evidence for a trigger? What types of firms could be considered nationally recognized? Should it be accredited or made to prove its competency? If so, how? What if ICANN receives contradictory opinions from two firms? How is it to determine the more valid argument?
- Public comment: How should public comments be incorporated into the Procedure?
 - What role should comments have in ICANN's decision-making process?
 - What length of public comment period is appropriate to ensure that the Procedure is completed in a timely fashion?
 - How should comments be analyzed?
 - Should public comments be treated as a safeguard in case a decision is flawed?
- On the IAG's first conference call it became apparent that the key issue was what trigger(s) would be appropriate for invoking the Procedure. The IAG spent most of that call and all of the five subsequent calls debating potential triggers.

4.2 Members of the IAG

The members of the IAG and their Statements of Interest can be found at

<https://community.icann.org/display/WNLCI/IAG-WHOIS+Conflicts+Team+Composition+and+SOI%27s>.

7. Deliberations of the IAG

This Section provides an overview of the deliberations of the IAG. The points outlined below are meant to provide the reader with relevant background information on the IAG's deliberations and processes, and should not be read as either final recommendations or as representing the entirety of the deliberations of the IAG. The IAG will not finalize its recommendations to the GNSO Council until it has conducted a thorough review of the comments received during the public comment period on this Initial Report.

5.1. Scope of Work

Per its Mission and Scope, the IAG was tasked to review a list of topics and questions, as part of its work to develop recommendations relating to the WHOIS Conflicts with Applicable Law Procedure.

5.2. Main Issues

At a minimum, the IAG was charged with considering the following issues that were highlighted in the recent [Report of Public Comments](#) on this topic. Those issues include:

- Process: Should the Procedure be revised to allow for invocation prior to contracting?
 - If adopted, how would that alter the contracting process?
 - What parties would be most appropriate to include at this early stage of the Procedure?
- Trigger: What triggers would be appropriate for invoking the Procedure?
 - Would evidence from a data protection authority that the contract is in conflict with national laws be sufficient to trigger the Procedure? If so, how would ICANN define which data protection authority is an acceptable authority? N.B. It is not incumbent on ICANN to define this, rather the relevant public authority.
Would the authority have to be a nationally representative body? Should a regional body's opinion carry the same weight as a national or local authority?
 - Similarly, would an official opinion from a governmental agency provide enough evidence? If so, which agencies would be most appropriate? Would it have to be an agency tasked with data protection? What about a consumer trust bureau or treasury department that includes consumer protections in its mandate? Or would a foreign ministry provide the best source of information? Which bodies would be considered authoritative enough to provide a creditable opinion?
 - Would evidence of a conflict from ICANN-provided analysis provide sufficient information to invoke the Procedure? What type of evidence should this analysis cite?
 - If the Procedure allowed for a written opinion from a nationally recognized law firm to provide sufficient evidence for a trigger? What types of firms could be considered nationally recognized? Should it be accredited or made to prove its competency? If so, how? What if ICANN receives contradictory opinions from two firms? How is it to determine the more valid argument?
- Public comment: How should public comments be incorporated into the Procedure?
 - What role should comments have in ICANN's decision-making process?
 - What length of public comment period is appropriate to ensure that the Procedure is completed in a timely fashion?
 - How should comments be analyzed?
 - Should public comments be treated as a safeguard in case a decision is flawed?

As noted above, the IAG spent the vast majority of its meetings discussing questions related to the appropriate triggers for invoking the Procedure. Early in its deliberations, the IAG seemed to support

allowing for invocation of the Procedure in advance of contracting, regardless of the trigger mechanism. Throughout the discussions, there also appeared to be general support to subject requests to invoke the Procedure to ICANN public comment processes.

8. IAG Preliminary Recommendation

1. Preliminary Recommendations

The IAG was tasked with providing the GNSO Council suggestions on how to improve the current WHOIS Conflicts Procedure. The following are the preliminary recommendations from the IAG as well as a proposal for which there is currently no consensus.

Majority support - Recommendation for Alternative Trigger

- Currently, the [Procedure](#) recognizes only one trigger for purposes of seeking relief from the conflict of a WHOIS obligation and national privacy law. The registry/registrar must have received “notification of an investigation, litigation, regulatory proceeding or other government or civil action that might affect its compliance.”

N.B. This procedure has always been inappropriate, as evinced by the fact that it has never been invoked.

- Under the “Alternative Trigger” proposal, a contracted party would not have to wait to receive notification of a proceeding against it. Rather, it could seek a written statement from the competent governmental agency indicating that a particular WHOIS obligation conflicts with applicable law and then submit that statement to ICANN. The agency statement would have to identify the inconsistency that the agency has found between applicable law and contractual obligations.

In addition, the agency would have to certify that it has the legal authority to issue such opinion. The contracted party’s submission of the agency’s opinion would be posted for public comment. The responsible GAC member (if any) would be solicited for comment. *See Appendix 1.*

Some support - Written Legal Opinion Trigger

N.B. Some members consider that it is not appropriate to refer such matters to a private Legal Opinion whereas the competent regional and national authorities are more appropriate. Consequently the Report also reports that there is opposition to this Option.

- A number of IAG members supported the addition of a trigger consisting of a written legal opinion from a nationally recognized law firm. The firm's opinion must state that national laws or statutes in the country of incorporation of a contracted party will affect its compliance with the provisions of the Registrar Accreditation Agreement or other contractual agreement with ICANN dealing with the collection, display or distribution of personally identifiable data via WHOIS.
- Such a trigger would be similar to a provision in the [2013 RAA](#)'s Data Retention Specification (DRS) by which registrars may request a waiver from compliance with specific terms and conditions of the DRS.
- Opponents to this trigger believe that a law firm opinion does not credibly demonstrate that a contracted party is legally prevented by local law to comply with its WHOIS obligations. These opponents note that law firms do not enforce local law and different firms in the same jurisdiction may present conflicting opinions.
- Contracted parties state that it is unreasonable to make them wait until they receive official notification of a proceeding against them before they can trigger the procedure. Some also expressed the concern that government officials often may not agree to provide an advisory opinion (as called for in the consensus recommendation above) and support a procedure that they can invoke proactively before they are subject to a legal or regulatory action. *See Appendix 2.*

Some support – Contracted Party Request:

N.B. On grounds of conditions of fair competition, it is necessary that ALL registries and registrars in the same jurisdiction (if not world-wide) benefit from the same derogation from the ICANN policy. Thus this option should not be considered further. (a) all registrants should be able to presume that their personal data will be processed in conformity with applicable law; (b) all registries and registrants should be eligible for the same derogation, irrespective of whether they have applied for it or not.

- If a registry or registrar proposes to limit its Whois obligations for some or all of its registrants it would need to present ICANN with:

- A request describing the legal conflict and why it's impossible to find a legal alternative including registrant consent or privacy/proxy services (mandatory)
 - Written support by all other affected registries and/or registrars or justification for why they are the only affected party (mandatory)
 - Written support/approval from a relevant governmental privacy agency (if one exists) (highly recommended but not mandatory)
 - 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
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- ICANN's investigation of the grounds for the request would include but not be limited to seeking input from the GAC, law enforcement and other interested parties; posting the request for 45 days to allow parties to file objections and requiring resolution of any objections. ICANN may also seek outside expert advice to help inform a final decision.

9. Conclusions & Next Steps

The IAG will complete the next phase of its work and develop its recommendations in a Final Report to be sent to the GNSO Council for review following its analysis of public comments received on this Initial Report.

9. Appendix 1

Proposed Alternative Trigger – majority support

(absent a “Whois Proceeding”)

Step One: Notification

Contracted party presents to ICANN a written statement from agency:

- (1) Specifying the facts before it, i.e.,
 - (a) the specific contracted party in question (registrar or registry)
 - (b) the applicable terms of service/registration agreements agency has reviewed
 - (c) the applicable provisions of the ICANN contract in question
 - (d) the applicable law it has analyzed
- (2) Identifying and analyzing the inconsistency agency has found between applicable law and contractual obligations, citing specific provisions of each
- (3) Certifying that agency has the legal authority to issue an interpretation of the applicable law which it has found to be inconsistent with contractual obligations, and that it has competence to this effect over the contracted party for these purposes.

Step Two: Consultation

In cases to which the Alternative Trigger applies, the Consultation Step includes a public consultation in which all interested parties can review the written statement submitted in the Notification Step and to comment on all aspects of it.

In such cases, ICANN would also consult with the GAC representatives (if any) from the country in question, pursuant to section 2.1.2 of the procedure.

10. Appendix 2

Written Legal Opinion (“Dual Trigger”) Alternative Trigger – some support (redline of existing procedure)

N.B. Several IAG participants consider the following option to be unworkable and unnecessarily burdensome. They recommend a block derogation for all registries and registrars subject to applicable law. Experience since 2008 suggests that such a procedure will not be invoked.

ICANN Procedure For Handling WHOIS Conflicts with Privacy Law

Effective Date 17 January 2008

Introduction and background

0.1 In December 2003, [1] the WHOIS Task Force 2 of the GNSO recommended the development of a procedure to allow gTLD registry/registrars to demonstrate when they are prevented by local laws from fully complying with the provisions of ICANN contracts regarding personal data in WHOIS.

0.2 In November 2005 [2], the GNSO concluded a policy development process on establishing such a procedure. It follows the 'well-developed advice on a procedure' recommended by the WHOIS Task Force and approved by the GNSO Council. [3] In May 2006, the ICANN Board [4] adopted the policy and directed ICANN staff to develop and publicly document a conflicts procedure.

0.3 On 3 December 2006, ICANN staff published the Draft ICANN Procedure for Handling WHOIS Conflicts with Privacy Law¹ ICANN sought input on the draft procedure from the Governmental Advisory Committee (GAC). Revised language has been incorporated into 1.4 below.

0.4 On X June 2015 the Implementation Advisory Group on WHOIS conflicts with National Law² published its report outlining possible improvements to this procedure. Public comment

¹ http://gns0.icann.org/issues/whois-privacy/whois_national_laws_procedure.htm

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

was sought on the report of the advisory group from X to X 2015. The final report was submitted to the GNSO Council for consideration at its September 2015 Meeting.

0.5 The procedure outlined below details how ICANN will respond to a situation where a registrar/registry [5] indicates that it is legally prevented by local/national privacy laws or regulations from complying with the provisions of its ICANN contract regarding the collection, display and distribution of personal data via WHOIS. The procedure is for use by ICANN staff. While it includes possible actions for the affected gTLD registry/registrar, this procedure does not impose any new obligations on registries/registrars or third parties. It aims to inform registries/registrars and other parties of the steps that will be taken when a possible conflict between other legal obligations and the ICANN contractual requirements regarding WHOIS is reported to ICANN.

1) **Step One: Notification of WHOIS Proceeding**

- a) At the earliest appropriate juncture, based on the receipt of either,
 - i) a written legal opinion from a nationally recognized law firm in the applicable jurisdiction that states that that national laws or statutes in the country of incorporation of a registrar might affect its compliance with the provisions of the Registrar Accreditation Agreement or other contractual agreement with ICANN dealing with the collection, display or distribution of personally identifiable data via WHOIS.
 - (1) Such written opinion shall
 - (a) specify the relevant applicable law, the allegedly offending elements, the manner in which the collection, display or distribution of such data violates applicable law, and a reasonable description of such determination and any other facts and circumstances related thereto,
 - (2) be accompanied by a copy of the Opinion and governmental ruling or guidance, as applicable, and
 - (3) be accompanied by any documentation received by Registrar from any governmental authority, in each case, related to such determination, and such other documentation reasonably requested by ICANN.

OR

- ii) a ruling of, or written guidance from, a governmental body of competent jurisdiction providing that compliance with the collection, display or distribution of personally identifiable data via WHOIS,
 - (1) such notice shall comprise the following elements

- (a) the specific contracted party in question (registrar or registry)
 - (b) the applicable terms of service/registration agreements agency has reviewed
 - (c) the applicable provisions of the ICANN contract in question
 - (d) the applicable law it has analyzed
 - (e) Identifying and analyzing the inconsistency agency has found between national law and contractual obligations, citing specific provisions of each
 - (f) Certifying that agency has the legal authority to enforce the national law which it has found to be inconsistent with contractual obligations, and that it has jurisdiction over the contracted party for the purposes of such enforcement
 - (g) Stating that agency [intends to enforce] [is prepared to enforce] [would consider enforcing] that law against the contracted party unless contractual obligations are adjusted in a specified manner
- b) a registrar/registry should contact ICANN to initiate the WHOIS proceeding. Additionally they should provide ICANN staff with the following
- i) Summary description of the nature and status of the conflict and a range of possible outcomes
 - ii) information for the responsible official of the registrar/registry acting as the primary point of contact in the matter
 - iii) If appropriate, contact information for the authors of the legal opinion, the responsible territorial government agency or other claimant and a statement from the registrar/registry authorizing ICANN to communicate with those officials or claimants on the matter. If the registrar/registry is prevented by applicable law from granting such authorization, the notification should document this.

Depending on the specific circumstances of the WHOIS Proceeding, the registrar/registry may request that ICANN keep all correspondence between the parties confidential pending the outcome of the WHOIS Proceeding. ICANN will ordinarily respond favorably to such requests to the extent that they can be accommodated with other legal responsibilities and basic principles of transparency applicable to ICANN operations.

Step Two: Consultation

2.1 The goal of the consultation process should be to seek 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.

2.1.1 Unless impractical under the circumstances, upon receipt and review of the notification, ICANN will consult with the registrar/registry. Where appropriate under the circumstances,

ICANN may consult with the local/national enforcement authorities or other claimant together with the registrar/registry.

2.1.2 Pursuant to advice from ICANN's Governmental Advisory Committee, ICANN may request advice from the relevant national government on the authority of the request for derogation from the ICANN WHOIS requirements.

2.2 If the WHOIS Proceeding ends without requiring any changes or the required changes in registrar/registry practice do not, in the opinion of ICANN, constitute a deviation from the RAA or other contractual obligation, then ICANN and the registrar/registry need to take no further action.

2.3 If the registrar/registry is required by local law enforcement authorities or a court to make changes in its practices affecting compliance with WHOIS-related contractual obligations before any consultation process can occur, the registrar/registry should promptly notify ICANN of the changes made and the law/regulation upon which the action was based.

2.4 The registrar/registry may request that ICANN keep all correspondence between the parties confidential pending the outcome of the WHOIS Proceeding. ICANN will ordinarily respond favorably to such requests to the extent that they can be accommodated with other legal responsibilities and basic principles of transparency applicable to ICANN operations.

2.5 In cases where the proceedings are initiated by means of Section 1(a)(i), the Consultation Step shall include a public consultation in which all interested parties can review the written statement submitted in the Notification Step and to comment on all aspects of it. . Prior to release of the report to the public, the registry/registrar or ICANN may request that certain information (including, but not limited to, communications between the registry/registrar and ICANN, or other privileged/confidential information) be redacted from the report.

Step Three: General Counsel Analysis and Recommendation

3.1 If the WHOIS Proceeding requires changes (whether before, during or after the consultation process described above) that, in the opinion of the Office of ICANN's General Counsel, prevent compliance with contractual WHOIS obligations, ICANN staff may refrain, on a provisional basis, from taking enforcement action against the registrar/registry for non-compliance, while ICANN prepares a public report and recommendation and submits it to the ICANN Board for a decision. Prior to release of the report to the public, the registry/registrar may request that certain information (including, but not limited to, communications between the registry/registrar and ICANN, or other privileged/confidential information) be redacted from the report. The General Counsel may redact such advice or information from any published version of the report that relates to legal advice to ICANN or advice from ICANN's counsel that in the view of the General Counsel should be restricted due to privileges or possible liability to ICANN. Such a report may contain:

A summary of the law or regulation involved in the conflict;

Specification of the part of the registry or registrar's contractual WHOIS obligations with which full compliance is being prevented;

Summary of the consultation process if any under step two; and

Recommendation of how the issue should be resolved, which may include whether ICANN should provide an exception for those registrars/registries to which the specific conflict applies from one or more identified WHOIS contractual provisions. The report should include a detailed justification of its recommendation, including the anticipated impact on the operational stability, reliability, security, or global interoperability of the Internet's unique identifier systems if the recommendation were to be approved or denied.

3.2 The registrar/registry will be provided a reasonable opportunity to comment to the Board. The Registrar/Registry may request that ICANN keep such report confidential prior to any resolution of the Board. ICANN will ordinarily respond favorably to such requests to the extent that they can be accommodated with other legal responsibilities and basic principles of transparency applicable to ICANN operations.

Step Four: Resolution

4.1 Keeping in mind the anticipated impact on the operational stability, reliability, security, or global interoperability of the Internet's unique identifier systems, the Board will consider and take appropriate action on the recommendations contained in the General Counsel's report as soon as practicable. Actions could include, but are not limited to:

Approving or rejecting the report's recommendations, with or without modifications;

Seeking additional information from the affected registrar/registry or third parties;

Scheduling a public comment period on the report; or

Referring the report to GNSO for its review and comment by a date certain.

Step Five: Public Notice

5.1 The Board's resolution of the issue, together with the General Counsel's report, will ordinarily be made public and be archived on ICANN's website (along with other related materials) for future research. Prior to release of such information to the public, the registry/registrar may request that certain information (including, but not limited to, communications between the registry/registrar and ICANN, or other privileged/confidential information) be redacted from the public notice. The General Counsel may redact such advice or information from any published version of the report that relates to legal advice to ICANN or advice from ICANN's counsel that in the view of the General Counsel should be restricted due to privileges or possible liability to ICANN. In the event that any redactions make it difficult to convey to the public the nature of the actions being taken by the registry/registrar, ICANN will work to provide appropriate notice to the public describing the actions being taken and the justification for such actions, as may be practicable under the circumstances.

5.2 Unless the Board decides otherwise, if the result of its resolution of the issue is that data elements in the registry/registrar's WHOIS output will be removed or made less accessible, ICANN will issue an appropriate notice to the public of the resolution and of the reasons for ICANN's forbearance from enforcement of full compliance with the contractual provision in question.

Step Six: Ongoing Review

With substantial input from the relevant registries or registrars, together with all constituencies, ICANN will review the effectiveness of the process annually.

[1] Whois Task Force 2, Preliminary Report, June 2004; <http://gns0.icann.org/issues/whois-privacy/Whois-tf2-preliminary.html>

[2] GNSO Council minutes, 28 November 2005; <http://gns0.icann.org/meetings/minutes-gns0-28nov05.shtml>

[3] Final Task Force Report 25 October, 2005 of the GNSO Whois Task Force; <http://gns0.icann.org/issues/tf-final-rpt-25oct05.htm>

[4] Board minutes, 10 May, 2006; <http://www.icann.org/minutes/minutes-10may06.htm>

[5] Reference to 'registries' in this document includes registry operators and sponsoring organizations.

Appendix 3

I. Background and Status of the Report

While thanking other members of the IAG and the ICANN staff for their work during the past eight months, I have to express my disappointment and disagreement with the report as it stands³. To present this to the GNSO and the ICANN Board would fail both to address the implementation issues that have already been encountered with the existing policy and to present a balanced account of the arguments that have been developed during the IAG's work.

Allow me to recapitulate the principle objections to the report that I have already evoked in the conference calls in which I have been able to participate, and on the mailing List:

1. **The 2005 GNSO policy** referred to in Section 3.1.1 is not a consensus policy in any sense of the word. The report admits that “the Whois Procedure has not been invoked and yet numerous concerns have arisen from contracted parties and the wider community.” In short, the original procedure allowing “exception(s) to contractual obligations ...” has failed.

3. Document dated 7 July 2015, revised and re-issued 9 September 2015.

2. During the May conference call, anticipating that the IAG report might not resolve the problems, I asked for a vote among all IAG members on the mailing list to determine whether this report is in fact a majority report of the WG or a minority report. Although I had understood that the ICANN staff had conceded that a vote was appropriate, no such vote has been undertaken.

I maintain my request for a vote.

II. Specific comments and observations

3. Although the proposed **Alternative Trigger (Appendix 1)** is an improvement on the present situation, and vastly to be preferred to the “Dual Trigger” (Appendix 2), it still leaves a great deal to be desired:

(a) The (repeated) references to '**national**' law casually dismiss the fact that in the European Union the relevant laws are regional in character. The text should refer throughout to 'applicable local law';

(b) The (repeated) references to '**enforcement**' ignore the fact that the entities responsible for authoritative interpretation of applicable law are not necessarily the same as the entities responsible for enforcement. The language used in the report casually dismisses the relevance of the European and national data protection agencies throughout the EU.

(c) The Alternative Trigger proposal still maintains that **each Registry or Registrar would have to individually request a specific exemption**. That would be unjustifiably onerous, costly and time-consuming. I have asked ICANN and IAG to consider a system of 'block exemption' whereby all the contracted parties within the same jurisdiction would receive the same exemption on the basis of a single procedure. Ideally, in the case of the European Union, all contracted parties incorporated in the EU Member States would benefit from a single exemptions.

There are, furthermore, sound **competition grounds for an uniform collective approach**. Under the proposed Alternative Trigger, different contracting parties would be operating under different contract conditions, of varying exigence, at least for a long time to come. Meanwhile, this would tend to distort the domain name market and face Registrants with invidious distinctions depending on whether or not their Registrar had received an exemption.

(d) Regarding the proposed **public consultation phase**, I confess to entertain a certain scepticism. Although it may go against the grain in the ICANN context, I have to say that the general public world wide, and even most of the ICANN community would expect operators such as Registries and Registrars to respect the law (even without the threat of 'enforcement'). They would not expect to be invited to review and comment on written statements from the competent authorities on such a specific legal and technical matter case by case, as the requests for individual exemptions came through the process.

Rather I would suggest that the only interested parties who would wish to comment would tend to be those critics of privacy and data protection policies, who appear to have been responsible for adopting the original 2005 Whois policy, which is at the source of the problems that have had to be addressed by the IAG today.

III. **An alternative Whois policy**

For the sake of completeness, may I also recall that I had proposed that the IAG consider two further options:

- that ICANN should **adopt, globally, international Best Practice** in the matter of Privacy policy and Data Protection. This is not so far fetched: there are several other areas of policy and practice where ICANN applies a higher bar to performance than that which would be required elsewhere. And should continue to do so.
- alternatively, in the matter of exemptions from contract conditions, one could **reverse the burden of proof**. That is, the primary default would be that the contracted party would conform to applicable local law, and that ICANN would have the option to initiate a contrary procedure should it deem that the stability and security of the Internet and the DNS would otherwise be prejudiced.

In this context one may note that numbers of ccTLD Registries and their Registrars do already conform to applicable local law; to the best of my knowledge this practice has never been challenged by ICANN as prejudicing stability and security in any way.

However, ICANN staff have issued the opinion that the mandate of the IAG-WHOIS excludes

consideration of alternative and improved policies, which is why the IAG has been obliged to spend a lot of time discussing the implementation of a policy which is seriously flawed in the first place

* * *

In the light of the above, may I once again invite ICANN and the IAG to reconsider the content of the report in question. I shall determine my definitive position in this respect, thereafter.

ICANN is currently being challenged to be accountable to the Community. For present purposes the relevant Community are all the Registrants of all the contracting parties whose personal data is not being protected in conformity with applicable local law consequent on ICANN's contractual conditions, as applied to Whois.

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11 September 2015